Corrections Corporation of America *and* International Union, Security, Police, and Fire Professionals of America (SPFPA) and Edward Carroll. Cases 21–CA–36223 and 21–CA–36225

July 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 3, 2005, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as discussed below.

The judge found that the Respondent violated Section 8(a)(1) of the Act by initiating a drive to decertify the Union (International Union, Security, Police and Fire Professionals of North America (SPFPA)) and then coercing its employees to support the decertification drive by informing them that it would know who did and who did not support that effort. The judge further found that the Respondent also violated Section 8(a)(1) by unlawfully transferring Correction Officer Carroll from his position as a court security officer to a less desirable position because of his union activities. Finally, the judge found that the Respondent violated Section 8(a)(3) and (1) by unlawfully discharging Correction Officer Mireles because of his union activities, including his attempt to represent another employee during a misconduct investigation. For the reasons discussed below, we affirm the judge's conclusions.

I. OVERVIEW

The Respondent operates a correctional facility in San Ysidro, California. During 2002, the Union sought to organize the Respondent's Correction Officers (COs). Carroll and Mireles actively campaigned for the Union during the organizing campaign. The Union was certified as the exclusive bargaining representative of the Respondent's COs at the San Ysidro facility on May 24, 2002. Following the Union's certification, Carroll and Mireles became the Union's acting vice president and president, respectively. Both represented the Union in bargaining, which began in November 2002. No agreement was ever reached. A decertification petition was filed on March 19, 2004.[2]

II. THE UNFAIR LABOR PRACTICES

A. Encouraging the Union's Decertification

1. Background

On October 6, 2003, Warden Barbara Wagner posted a memo purportedly responding to questions asked by employees about the Union. As detailed in the judge's decision, the questions answered in the memo included, "Do you have to be a member of the Union to sign a decertification petition or to vote in any certification election?" and "How can we get rid of the union?" The memo also referenced a website that displayed a sample decertification petition.

Wagner testified that three employees inquired about getting rid of the Union. Of the three, only CO Francisco De La Fuente testified. According to Wagner, following a discussion about the Respondent's health benefits plan, De La Fuente asked her how do "we" get rid of the Union. This account, however, was at odds with the version provided by De La Fuente, whose testimony emphasized that he had sought out Wagner because he was frustrated by the lack of options that Respondent provided for health care and wanted to know what other plans were available for his family. De La Fuente testified that he did not even know he was represented by a union until he spoke to Wagner, who answered his inquiry by telling him that no other plans were available because the Union had already "voted" on the existing plan.

The judge found that Wagner mischaracterized De La Fuente's purpose, in that De La Fuente could not have approached Wagner to ask how to get rid of the Union when he had been unaware that the Union held representative status. Wagner used De La Fuente's limited inquiry on benefits as the basis for volunteering the opinion that De La Fuente did not have access to other plans because of the Union, thereby directly attempting to undermine the Union. Indeed, the judge found that Wagner's response to De La Fuente was false: no union-negotiated health plan was in place at that time. The judge also discredited Wagner's denial that she posted the page of the memo asking about decertification and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] Dates hereafter are in 2004, unless otherwise indicated.

her remaining uncorroborated testimony that employees had asked her how to get rid of the Union, finding that the memo was not a response to any employee-generated concern, but instead an "underhanded, stealthy effort to get rid of the Union." The judge also found that the Respondent's effort included creating a "parade of horribles" comprised of distortions and untruths regarding the Union's internal procedures. The judge further found that the Respondent coerced the employees to support the decertification effort by implying that it would know who did and who did not support its effort to oust the Union.

2. Discussion

We agree with the judge that the Respondent violated Section 8(a)(1) by unlawfully encouraging the employees to seek decertification of the Union. "An employer may not 'initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition.'" *Sociedad Espanola De Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004) (quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985)). It is not determinative that an employer does not expressly advise employees to get rid of the union. *Armored Transport, Inc.*, 339 NLRB 374, 378 (2003) (citing *Wire Products Mfg. Corp.*, 326 NLRB 625, 626 (1998), enfd. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000)). Indeed, such direct appeals are not essential to establish that an employer solicited decertification. Id. at 378.

The Respondent argues that its statements about decertification were merely in response to employee inquiries on how to decertify the Union. We agree with the judge that the Respondent's position has no merit.

The credited testimony establishes that the Respondent's communications about decertification were not prompted by employee inquiries and that the idea of decertifying the Union was conceived by the Respondent and then proffered to the employees. See, e.g., *Condon Transport, Inc.*, 211 NLRB 297, 302 (1974). There is no credible evidence that any employee ever asked the Respondent how to get rid of the Union. As noted above, the only employee to testify on this issue was De La Fuente. That testimony shows that, in response to his complaints about health benefits, Warden Wagner falsely stated that no other plans were available because the Union had "voted" for the current health care packages. Then, the Respondent distorted De La Fuente's inquiry (as to how to obtain additional health benefits) to suggest to employees that De La Fuente had asked how to decertify the Union.[3] Thus, this is not a case of an employer aiding employees in the "expression of their predetermined objectives." *Poly Ultra Plastics, Inc.*, 231 NLRB 787, 790 (1977) (employer's president assisted employees with the petition they were preparing to allow them to revoke their authorization cards). Instead, Wagner's posting was a "transparent attempt to invite procompany antiunion efforts with implied support." *Northwest Graphics, Inc.*, 342 NLRB 1288, 1297 (2004). Furthermore, the Respondent's statement implying that it would know who did, and who did not, support the decertification drive added coercive force to its efforts to rid itself of the Union. Under these circumstances, we find that the Respondent violated Section 8(a)(1) by unlawfully encouraging its employees to decertify the Union.

B. Edward Carroll's Reassignment

1. Background

The Respondent hired Carroll in April 2000, and initially assigned him as a new officer to work in one of the prison's inmate housing unit pods under an irregular 6-days-on, 2-days-off schedule. In May 2002, Carroll, and fellow COs Cason, Lizarraga, and Maldonado, were selected to work as primary courtroom officers. This was a more desirable position because primary courtroom officers have a significantly better work environment, and a schedule that regularly provides them every Saturday and Sunday off. Carroll worked as a primary courtroom officer until October 2003, when he had knee surgery.

When Carroll returned to work on or about January 11, 2004, the Respondent assigned him back to an inmate housing unit pod. Earl Semler, the Respondent's chief of security, testified that he reassigned Carroll because he had been working in the courtrooms for more than a year and it was time for Carroll to work someplace else so that other COs could be trained to work as court security officers. Asked why he had selected Carroll over the other COs who had been working as court security officers, Semler simply explained that "you have to start somewhere." The Respondent submitted into evidence an employee chart involving courtroom assignments, ostensibly to support its training claim. The chart does

[3] The judge stated that "De la Fuenta initially gave some confusing testimony" but "never testified that he had asked Wagner how to get rid of the Union." In this testimony, De La Fuenta testified that he did inquire about the steps he could take to deal with his employer directly or to "bypass" the Union to resolve the medical benefits issue. Even assuming that De La Fuenta asked how he could deal directly with the Respondent, we agree with the judge that De La Fuenta initially approached Wagner only to discuss insurance options, and that Wagner steered the conversation toward the Union as to the source of De La Fuenta's dissatisfaction, all as part of a plan to instigate a decertification effort and coerce employees into supporting it.

not reflect, however, who replaced Carroll as a courtroom trainee during the relevant time period. Just 2 weeks before the unfair labor practice hearing, the Respondent notified Carroll that he was being reassigned to the courtrooms on a full-time basis. Semler's only explanation for this reassignment was simply that "it was time for [Carroll] to go back in" the courtrooms.

The judge found that Carroll was a known union adherent, and that the Respondent's unlawful effort to encourage the employees to decertify the Union demonstrated union animus. He further found that the Respondent's assertion that Carroll's reassignment was necessitated by the need to train other COs to serve as court security officers rang hollow given that the evidence, including the courtroom assignment chart submitted by the Respondent, failed to support that assertion. The judge instead found that Semler's asserted reason for reassigning Carroll was pretextual, and concluded that the Respondent failed to show that Carroll would have been reassigned in the absence of his union activities.[4]

2. Discussion

Under *Wright Line*,[5] the General Counsel meets his initial evidentiary burden by establishing that: (1) the employee engaged in protected activity; (2) the employer knew of that activity; and (3) the employer demonstrated animus toward protected activity.[6] If the General Counsel makes such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place in the absence of the protected conduct." See *Wright Line*, supra at 1089.

We find, as did the judge, that the General Counsel met this initial evidentiary burden. The Respondent clearly knew of Carroll's union activities through, among other things, Carroll's participation as the Union's representative in contract negotiations. The Respondent's unlawful encouragement of its employees to decertify the Union, discussed above, provides the requisite evidence of animus.

We also agree that the Respondent failed to satisfy its *Wright Line* burden by demonstrating that it would have reassigned Carroll from courtroom duty even absent his union activities. Thus, the record supports the judge's finding that the Respondent's explanation for reassigning Carroll was pretextual (that is, either false or not in fact relied on) and that the Respondent, therefore, failed to show that it would have taken the same action absent Carroll's protected conduct. See *Cox Communications Gulf Coast, L.L.C.*, 343 NLRB No. 26, slip op. at 1 (2004); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

According to the Respondent's chart, during the period in which Carroll was reassigned to an inmate pod (January 6, 2003 through September 2, 2004), only two COs were assigned to the courtrooms for training who had not been part of the original group of COs selected along with Carroll in May 2002. Those two training assignments, which involve COs Samaniego and Wheeler, appear to bear no direct correlation to Carroll's absence from the courtrooms. CO Samaniego was not assigned courtroom duty until March 11, 2 months after Carroll's reassignment, and CO Wheeler was not assigned courtroom duty until early June.

Moreover, the Respondent did not refrain from returning COs to full-time courtroom work at the same time other COs were being trained in the courtrooms. Thus, COs Rios and Cason, who had been removed from the courtrooms for disciplinary reasons, were returned to full-time courtroom assignments while Wheeler was assigned to courtroom training. The Respondent has also provided no explanation for why it returned Rios and Cason ahead of Carroll, who was reassigned to the courtrooms full time only as the unfair labor practice hearing in this matter drew near. Furthermore, the Respondent has provided no explanation for why it did not reassign COs Cason, Lizarraga, and Maldonado to work outside the courtrooms instead of Carroll when they, like Carroll, had all been working in the courtrooms for over a year at the time the Respondent allegedly decided that someone had to be reassigned so that other COs could receive courtroom training.[7]

For the foregoing reasons, we agree with the judge that the Respondent's explanation for reassigning Carroll was pretextual, and that the Respondent failed to show that it would have taken the same action absent Carroll's protected conduct. Accordingly, we adopt the judge's finding that Carroll's reassignment violated Section 8(a)(1).

C. Cruz Mireles' Discharge

On February 23, 2004, the Respondent discharged Mireles allegedly for abandoning his post in the inmate housing unit pod, lying about why he took that action, using profanity during a morning briefing, and insubor-

[4] Although the complaint alleged that Carroll's reassignment violated Sec. 8(a)(3) and (1), the judge found only a violation of Sec. 8(a)(1). The General Counsel has not excepted as to the disposition of this 8(a)(3) allegation.

[5] See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

[6] Member Schaumber would find that the General Counsel must also show a causal nexus between the Sec. 7 animus and the adverse employment action. See *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003), for further explanation.

[7] Unlike Carroll, COs Cason, Lizarraga, and Maldonado were not actively involved with the Union.

dination. The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging Mireles because of his union and concerted activities. The Respondent contends that Mireles' discharge was not discriminatorily motivated but was instead based on Mireles' misconduct, and further asserts that the activity for which he was disciplined was not protected by the Act. For the reasons below, we agree with the judge that the Respondent unlawfully discharged Mireles.[8]

1. Post Abandonment

CO Alejandro Castillo was ordered to Warden Wagner's office on February 13. Believing that he was facing a disciplinary investigation, Castillo asked Ryan Vaught, the officer in charge of the facility's central control, to contact Mireles, as his union representative, and have him go to the Warden's office in administration. Vaught called Unit B, where Mireles was assigned as a pod officer. Mireles, who was then relieving CO John Donahue in the pod's control unit, answered. Vaught advised Mireles that Castillo wanted to see Mireles in the Warden's office. Mireles replied that he could not leave until Donahue returned from his break because only two other COs were on duty. When Donahue returned, Mireles informed him of his need to go to the Warden's office. Mireles did not ask permission from a supervisor to leave given that he had never sought it in the past.[9] Donahue allowed Mireles to leave.

When Mireles arrived in administration, he saw through a window into the Warden's office that Wagner and Chief of Security Semler were already talking to Castillo. Unable to get Wagner's attention, Mireles sat and waited outside the office. When Wagner exited her office, Mireles asked whether he was needed because Vaught, from central control, had told him to come to administration. When Wagner and Semler informed Mireles that neither one of them had called him, he left. While Mireles was away from his post, CO Neri performed Mireles' safety checks in unit B. At Wagner's request, Semler began an investigation into why Mireles had left his post and assertedly had lied about who called him to administration, based on Wagner's account that Mireles had stated that either Semler or "admin 4" had called him to administration.

2. Use of profanity

About a week later, during the morning briefing on February 21, Mireles noticed that his fellow COs were not paying attention to Assistant Supervisor Barbara Harper's instructions regarding logging in and out. Upset by the employees' behavior, Mireles stood up and said, "This is bull shit. You guys need to pay attention. She's trying to make you understand how not to get in trouble like I'm getting in trouble."[10] Later that day, Harper admonished Mireles for his actions that morning. She also mentioned the incident to her shift supervisor, Jerome Williams. Williams, in turn, advised Semler, whose investigation of Mireles remained pending at that time.[11]

3. Refusal to fill out an incident report

According to Mireles, Senior Correction Officer Roland Small asked him to fill out a "5–1C" incident report within days of the morning briefing incident.[12] Because Mireles was busy with unit control duties when this request was made, he told Small that he would fill it out later. When Small asked if he was refusing to complete the report, Mireles responded that he would complete it later. Small then left with the form. Small, on the other hand, denied asking Mireles to complete an incident report. Instead, Williams testified that he called Mireles and asked him to complete a 5–1C incident report and that Mireles responded, "I am not providing a 5–1C because [they are out to get me] anyway." The judge found it unnecessary to resolve these conflicting accounts, as explained below, although he was inclined to credit Mireles' version.

4. Termination decision

On February 24, following Semler's investigation, the Respondent discharged Mireles. Wagner testified that she based that decision on three factors: Semler's recommendation that Mireles be discharged for post abandonment and for lying about why he took that action, the admonishment concerning the morning briefing incident together with Mireles's refusal to complete an incident report, and Mireles' disciplinary history. According to Wagner, Mireles' post abandonment and refusal to fill

[8] The judge found that Mireles' discharge was also an independent 8(a)(1) violation. In light of our disposition of the other violations, we find it unnecessary to pass on the judge's finding because it is cumulative and does not materially affect the remedy.

[9] Each housing unit pod has a copy of the post orders, which cover the pod's rules and the COs' responsibilities. Item "B" states that COs "observe all activities on the post, and vacate the post only when properly relieved or instructed by a duly authorized supervisor." Item H states, "It is the COs' responsibility to notify their supervisor when they have *not* been provided the time *or* have not been properly relieved to take any of their breaks" (emphasis added). COs Enrique Neri, Carroll, and Mireles each testified that supervisors had affirmatively directed that they not be bothered when an officer needed to temporarily absent himself from the pod.

[10] Mireles denied stating, "This is fucking bullshit."

[11] Semler's report is dated February 23.

[12] Generally, COs are required to complete an incident report immediately when asked to do so. An exception is made if COs are involved in something critical; however, the COs must complete the incident report by the end of their shift.

out an incident report about his use of profanity were independent grounds for discharge.

5. Discussion

We find that the judge, applying *Wright Line*, supra, properly concluded that Mireles' protected activity was a motivating factor in the Respondent's conduct. There is no dispute that Mireles was involved in union and concerted activities, including, but not limited to, responding to Castillo's *Weingarten*[13] request for a representative and serving as the Union's acting president. There is also no dispute that the Respondent was aware of such activity. Furthermore, we find animus based on the 8(a)(1) violations discussed above.

The Respondent argues that it discharged Mireles because he engaged in several acts of misconduct. We agree with the judge that these acts either involved protected conduct or were seized upon by the Respondent as a pretext for ridding itself of the principal union leader.

The Respondent asserts that Mireles lost the Act's protection when he used profanity during a morning briefing. In determining whether an employee retains the protection of the Act despite his use of profanity, the Board balances the right of the employee to engage in concerted activity with the employer's right to maintain order and control. See, e.g., *New Process Gear*, 249 NLRB 1102, 1109 (1980); *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). We find that the balance here tips in favor of finding Mireles' conduct protected. Profanity was commonly used at the facility by COs and supervisors alike, and was used in the briefing room. Furthermore, Mireles' single profanity was spoken while Mireles was serving in his role as a union leader and in an attempt to protect his fellow COs. It was also uttered for the apparent purpose of encouraging the COs to listen to management's instructions regarding logging rules, rather than for the purpose of interfering with the conduct of the meeting, and it does not appear to have impeded in any way management's efforts to communicate its instructions regarding the use of logs. Accordingly, we agree with the judge that Mireles' limited use of profanity under these circumstances did not cause him to lose the Act's protection. See, e.g., *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807–808 (2004) (employee did not direct profanity toward his supervisors or other employee; rather, he used it to describe a new system in the work process); compare *Aluminum Co. of America*, 338 NLRB 20, 21–22 (2002) (employee engaged in "repeated, sustained, ad hominem" profanity that was "sever[e]," "vituperative," and directed at supervisors).

[13] See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Based on the credited evidence, we also agree that the pretextual nature of the Respondent's grounds for discharge is clear. See *Limestone Apparel*, supra, 255 NLRB at 722. Thus, Mireles did not abandon his post, as alleged. Both Vaught, the central control officer, and Donahue, the unit control officer, knew that Mireles had left his post to go to administration in response to a request that he do so. Indeed, Mireles specifically informed Vaught that he had to wait for Donahue to return before going to administration so that the unit could remain covered by a control officer and two COs. Moreover, while Mireles was away from his post, CO Neri covered for him by making the necessary safety checks.[14]

The credited evidence further demonstrates that the Respondent took advantage of this incident as an opportunity to get rid of the union president. Thus, Wagner directed Semler to conduct an investigation of why Mireles had "lied" about who had called him to administration. Even if it was not clear exactly who had made the request that Mireles attend Castillo's disciplinary meeting, it would have been obvious to all why Mireles had been asked to attend the meeting. Further, as the judge found, Semler's expansion of the investigation appears to have been prompted by a management directive to create as large a paper trail as possible, and his exaggeration of the acts of alleged misconduct also appear designed to camouflage a discriminatory discharge.[15] Simply put, Semler was prompted to investigate Mireles for discriminatory reasons, and the Respondent ultimately discharged him for reasons that either were untrue or were not, in fact, relied on. Under the circumstances, we find that the Respondent violated Section 8(a)(3) and (1).[16]

[14] We also reject the Respondent's contention that Mireles also lost the Act's protection as a result of abandoning his post, as the credited evidence shows he did not.

[15] On this basis we agree with the judge that it is unnecessary to resolve conflicts in the testimony regarding Mireles's claimed insubordination.

[16] We also reject the Respondent's argument that the judge erred by barring it from presenting additional information on Mireles' general suitability for employment. The Respondent claims that, if it had known at the time that information Mireles provided with his job applications was false, it would have disqualified him from employment and that reinstatement and backpay are not appropriate remedies even if the Board finds that it violated the Act by discharging Mireles. As found by the judge, the information proffered by the Respondent was not newly discovered. Mireles' credited testimony establishes that he was given clearance to work by then-Warden Reavis and then-Investigator Chacone after he satisfactorily explained certain information provided with his job applications which the Respondent now wishes to revisit. Under the circumstances, we agree with the judge that Mireles's suitability for employment was "thoroughly vetted and that the Respondent hired Mireles with full knowledge." See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994) (holding that it is the employer's burden to prove that the

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Corrections Corporation of America, San Ysidro, California, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. July 28, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Stephanie Cahn, for the General Counsel.
Richard R. Parker, Ogletree, Deakins, Nash, Smoak and Grove, of Nashville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in San Diego, California, on October 4–7, 2004,[1] based upon a consolidated complaint issued June 17, by the Regional Director for Region 21. The underlying unfair labor practice charges were filed by International Union, Security, Police and Fire Professionals of North America (SPFPA), (the Union), on March 25 (later amended) and by Edward Carroll, an individual, on April 21. The complaints were consolidated on July 30. Together they allege that Corrections Corporation of America (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

ISSUES

Specifically, the complaint alleges that Respondent transferred employee Edward Carroll from his duties as a court security officer to working as a guard in the prison pods because of his union activities. Second, it alleges Respondent discharged employee Cruz Mireles because of his union and protected concerted activities, including his attempt to represent an employee during what objectively appeared to be an investigation of another employee's misconduct, activity he was entitled to perform under the Weingarten doctrine.[2] Carroll and Mireles were the Union's only officials who worked at the facility. The complaint also asserts Respondent during the time period in question was in the process of encouraging its employees to decertify the Union, stating it would know who supported decertification and who did not, implying a promise of benefit for those who supported it. This is alleged as an independent Section 8(a)(1) violation.

Respondent denies all the allegations and contends that the personnel actions it took were nondiscriminatory: Carroll's transfer was routine and Mireles had given it good cause for discharge as he had abandoned his post and had used unacceptable language during a pre-shift meeting.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by both the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Tennessee corporation having its principal offices and headquarters in Nashville. In the course of its business it operates this correctional facility near San Ysidro, California, a border community south of San Diego. It admits that during the12-month period ending February 13, 2004, a representative period, it purchased and received at its San Diego facility goods valued in excess of $50,000 directly from sources outside California. It therefore admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Respondent contracts with public entities to operate private prisons across the United States. The San Ysidro detention center, known as Respondent's San Diego Correctional Facility, operates pursuant to contracts with the U.S. Marshals Service and the Citizenship and Immigration Service (formerly known as the Immigration and Naturalization Service). At the facility Respondent houses approximately 1500 inmates and employs approximately 270 correctional officers. The inmates include individuals in the custody of the U.S. Marshals Service who are awaiting trial, as well as individuals in the custody of the CIS, who are alien felons who have served in their prison terms elsewhere in United States and who are awaiting deportation. It is considered a medium to maximum security facility.

The prison consists of six housing units, each of which is physically separated from the others. Most of the units are divided into three housing 'pods.' Depending on its size, each pod holds between 68 and 100 inmates. The units and their pods are identified by an alphabet letter. The B unit is the highest security unit, as it holds the U.S. Marshal prisoners. Women are incarcerated in the J unit. On a routine basis, a correctional officer is assigned to each pod. A fourth correctional officer sits in a plexiglas center atop the three pods and has visual access to most of each pod on the floor below. He is known as the unit control officer.

At the time of the incidents described here, the Chief Executive Officer of the prison was Warden Barbara Wagner. Her staff includes two assistant wardens, the chief of security and

discriminatee engaged in misconduct for which the employer would have disqualified any employee from continued or future employment).

[1] All dates are 2004 unless stated otherwise.

[2] See generally, *NLRB v. J. Weingarten, Inc*., the 420 U.S. 251 (1975).

his assistant, the shift supervisors, assistant supervisors, and senior correctional officers. The senior correctional officer is generally considered the first line supervisor. In addition, management is supported by a human resources officer and also has access to a full-time investigator. The investigator appears to report directly to the warden. His duties include investigating all types of misconduct occurring within the facility.

During 2002, correctional officers Cruz Mireles and Edward Carroll led an organizing campaign which resulted in a representation election conducted by the Board. The Union was certified as the correctional officers' bargaining representative on May 24, 2002. The Union chose not to create a local union or conduct an election of local officers until a collective bargaining contract had been negotiated and the full scope of the represented employees/members could be determined. As a result, the Union's district vice-president, Daniel Payne, designated Mireles and Carroll as the interim or acting local president and vice president respectively. In addition to holding those positions, both Mireles and Carroll served as bargaining committee members while Payne sought to negotiate the initial collective bargaining agreement. Respondent, through Warden Wagner and Investigator Myron Pitula, recognized that Mireles and Carroll were the only union representatives on the staff.

The parties engaged in collective bargaining shortly after the certification issued. According to Mireles, bargaining sessions were held approximately twice a month, finally ending sometime in October 2003. No agreement was reached even though at one stage a federal mediator was asked to assist. No bargaining sessions were held thereafter.

III. THE ALLEGED UNFAIR LABOR PRACTICES

a. Respondent encourages decertification

In October 2003, because bargaining had not produced a contract and because Respondent feared a strike might ensue, Warden Wagner began conducting so-called bargaining update meetings. Among other things she advised the employees that the Union was not in their best interest; indeed, Carroll described her attitude during these meetings as "hostile" toward the Union. On October 8, 2003, Wagner sent a letter to each employee at his or her home. In that letter she described a strike as a "serious threat with which you and your family may soon be confronted—a labor strike." (Emphasis in original.) Despite the fact that none of the employees was a constitutional member of the Union, Wagner stated in her letter:

> [To] the extent some officers choose to abandon their job and go on strike, we will move quickly to fill those positions with permanent replacements (which will I will explain later). Union members, who cross a picket line and come to work, may be subject to union fines or other discipline. So, Union members who do not want to strike and want to continue working may wish to resign their union membership. . . .

Wagner went on to detail the consequences of a strike, including relatively accurately describing the limited rights held by economic strikers concerning their right to return to their job at the end of the strike.

About the same time, Wagner also began posting memos on the bulletin boards and in the briefing room. General Counsel's Exhibit 3, a 4-page memo, was posted about October 6, 2003. In that memo she contended that she had been fielding a lot of employee questions and the memo would answer them. She encouraged employees to ask additional questions, saying "This process is too important to all of us, our families, and the future of our facility herein San Diego for us not to talk to one another. To the extent I can, within the limitations imposed by law, I will post the questions and answers."

The first question the memo posed was "Who gets to vote on the contract proposals/strike vote?" Her answer: "Only Union members who are in good standing with the Union are entitled to vote, under the Union's Constitution. (Art. XXXVII)." This answer is misleading at best and a deliberate falsehood at worst. The Union's constitution has no bearing on a first contract and none of the employees in the bargaining unit were, or had become, union members. At the hearing, Carroll testified, in contradiction, that all of the bargaining unit employees are entitled to vote in such a circumstance, without regard to whether they were the Union's constitutional members.

Wagner's second question was: "Do you have to be a member of the union to sign a decertification petition or to vote in any decertification election?" Her answer was: "No. Any bargaining unit employee—in our case, any current correctional officer—may sign a decertification petition and would be eligible to vote in any decertification election." This was followed by a short explanation repeating the answer but also stating that whether an employee signed or did not sign the petition, or whether the employee voted for or against keeping the Union, or whether an employee was or was not a union supporter would not affect how Respondent would treat him or her. This appears to be the first anyone had mentioned decertification of the Union.

Despite Wagner's assurance that Respondent would not treat an employee differently because of his support or lack of support for the Union, the question is entirely based upon its own self-interest, not the interest of the employees.[3] Aside

[3] In *Auciello Iron Works*, 517 U.S. 781, 792 (1996) in a slightly different context, the Supreme Court, through Justice Souter said:

> Nor do we find anything compelling in Auciello's contention that its employees' statutory right "to bargain collectively through representatives of their own choosing" and to refrain from doing so, 29 U.S.C. § 157, compels us to reject the Board's position. Although we take seriously the Act's command to respect "the free choice of employees" as well as to "promot[e] stability in collective-bargaining relationships," *Fall River Dyeing v. NLRB*, 482 U.S. 27 at 38 (1987) (internal quotation marks omitted), we have rejected the position that employers may refuse to bargain whenever presented with evidence that their employees no longer support their certified union. "To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.

from Wagner's claim that she was answering an employee question, there is no evidence that an employee had ever made such an inquiry. As will be seen below, Wagner was not really answering any questions originating from an employee.

The next question was: "How can we get rid of the union?" Wagner's answer: "Employees may vote the Union out, just like they voted the union in." She then described the decertification process. She said "To start the process, at least 30 percent of the correctional officers must sign and date a petition saying they no longer want to be represented by the Security, Police and Fire Professionals Union. Once at least 30 percent of the correctional officers have signed the petition, it must be filed with the local National Labor Relations Board office (providing the address and telephone number). "That information was followed by some relatively accurate facts concerning the election process and the Act's protection." She also made a prophylactic statement to the effect that the Company could not assist with the decertification process, and noted the limits on the times and places for solicitation of signatures on the petition. She suggested that the employees act quickly because if a collective-bargaining contract were signed, the right to vote the Union out would be barred for the length of the contract (up to 3 years).

The memo concluded by referring the employees to a page on the internet website operated by the National Right to Work Legal Defense Foundation. That page provides a sample decertification petition. Lastly, she repeated the telephone number for the NLRB's San Diego Resident Office.

Curiously, Warden Wagner denied that she had posted the third page of the memo, the page in which she described the decertification process. She testified that she usually initials the documents she posts. She believed she did not post that page because the copy she was shown was not initialed. (The page had also been produced pursuant to the General Counsel's subpoena.) Subsequently, an initialed version was provided to her though it is not in evidence. Despite seeing her initials on the page she continued to deny posting it. Given Carroll's testimony, I have no hesitation in concluding that Warden Wagner posted the entire exhibit, including the Q and A described here.

On the fourth page, Wagner posed the question "How do I resign my union membership?" She again stated that although the company took no position about maintaining union membership, that membership would not affect how the employees would be treated, and that membership was the employees' choice, they could resign by sending "at a minimum," a certified letter to the Union resigning their membership. She then provided the Los Angeles address and FAX number of David Payne, the SPFPA's regional vice president.

Item 4 on that page includes the following statement: "To the extent the Company knows who does and who does not sign a petition or support the Union, the Company would never use that information to treat one officer different from another officer." This sentence deliberately creates a duality in perception. It seems to be a promise that the Company will not treat employees differently because of their union preferences or beliefs. At the same time, though, it states that it knows—to some extent, at least—about the union sympathies and preferences of its employees. By itself that suggests that Wagner has the means to determine who would become involved in the decertification movement. Of course, she sees that movement as desirable and is, in the same breath urging the employees to take those steps. Connected to that assertion is the logical conclusion that Respondent would know who and who did not support its effort to oust the Union. In essence, Wagner was saying the Company could monitor employee participation in the decertification effort.

Wagner testified that the reason she posted the material was because employees had asked her how to get rid of the Union. In support of that contention Respondent offered the testimony of employee Francisco de la Fuente, who had been hired in July 2003, more than a year after the Union was certified. De la Fuente's testimony, however, did not support Wagner; on the contrary, he contradicted her. He testified that he had developed a complaint regarding the adequacy of Respondent's health plan and sought to speak to her about it, hoping to persuade the Company to offer additional and/or better plans. He was unaware that the Union held representative status. When he was hired, Respondent had offered him its then extant health insurance plan. He initially gave some confusing testimony regarding his understanding of the plan or plans available to him, but then testified that Wagner told him that the reason Respondent could not offer him any other plan was because the Union had already 'voted' for the existing plan. His testimony:

JUDGE KENNEDY: Okay. Tell me another—tell me again what she responded to you.

THE WITNESS: To my original question, sir—

JUDGE KENNEDY: Well, yeah.

THE WITNESS:—was that, because of some issues, some legal issues with the union, that she could not elaborate on what was hanging over our heads, if you will, on what decisions we could make as far as getting another plan, as far as making decisions to, well, this is what I want and this is what I don't want, because it had already been voted into place.

JUDGE KENNEDY: That's what she—she said about vote? Who said the—who made the reference about voting into place?

THE WITNESS: Of the existing plan, sir, that the union had voted that particular plan.

JUDGE KENNEDY: The union had done that?

THE WITNESS: Yes, sir.

If what De la Fuente said is accurate, Wagner's statement to him was a direct effort to undermine the Union's representative status. First, her statement was false. No union-negotiated health plan was in place. The only health plan was that which was provided by Respondent. Presumably, it had been in place for a number of years. Second, in order to change the plan, Respondent was obligated under Section 8(d) of the Act to notify and bargain with the Union. Therefore, Wagner's in-

The same can be said of an employer who seeks to induce its employees to oust their bargaining representative. The fact is, such an employer cannot be seen as making a benevolent endeavor for its employees if it takes such a course. The employer has its self-interest to watch over and those interests are not necessarily aligned with those of its employees. As Justice Souter noted, the employees can take their own steps to protect their interests if they choose.

sinuation to De la Fuente that the plan could not be changed was misleading. Either way, Wagner's purpose was not to edify de la Fuente; it was to enlist him in her effort to undermine the Union's representative status. She was telling De la Fuente that the reason he didn't have an adequate health plan was because of a decision made by the Union. De la Fuente never testified that he had asked Wagner how to get rid of the Union. In fact, he would not have done so because he was unaware that the Union held representative status. Indeed, he testified that the first time he had ever heard about the Union was when Wagner responded to his question about the health plan's adequacy.

Certainly De la Fuente's testimony does not support Wagner's testimony that she posted (GC Exh.) 3 in response to employee questions. Moreover, Respondent offered no other employee testimony to substantiate her stated reason. In a very real sense, calling De la Fuente for that purpose backfired.

Likewise, General Counsel's Exhibit 4 does not assist Respondent. It is Wagner's January 9, 2004 bulletin board response to a question supposedly deposited in Respondent's 'Ask-It-Basket.' The question came from a conveniently anonymous employee. The question itself tends toward the pejorative. It begins with "Is there any way that CCA could take in consideration what the majority of the CO's [correctional officers] really want and not what 2 military retired reps have to say for approx. 210 officers." It goes on to assert that the two individuals don't really represent the majority, but only those employees who are retired military.

First, it should be noted that this supposed question is asked in such a way as to split the "retired military" employees from those who were not retired military. It is a classic wedge, suggesting that the Union was favoring some employees over others. Next, Wagner answered the question by once again observing that the employees had the right to decertify the union, taking the opportunity to observe that collective bargaining had failed and that the employees had done well via an annual U.S. Department of Labor wage determination, effective about a week earlier. The last, of course, is an unvarnished claim that the employees didn't need union representation. She also gave lip service to employee rights to have or not have union representation. This source-less "Ask-It-Basket" story, like the mischaracterization of De la Fuente's purpose, cannot be accepted as anything but a transparent effort to undermine the Union's representative status. Both the question, with its wedge, and the answer are the product of Respondent's union-ouster party line.

The Respondent has therefore presented no credible evidence that any employee ever asked how to get rid of the Union. When these two stories are melded with Wagner's' advice on the memo's third page regarding how to resign from the union and what steps were needed to file a decertification petition, Respondent's purpose has become clear: Respondent wanted to end any obligation to continue to deal with the Union. To carry out that purpose it had decided to implant sufficient fear, suspicion, and rejectivity in its employees' minds. The effort included distorting the facts and creating a parade of horribles. To De la Fuente Respondent blamed the Union for shortcomings in its own health plan. To others it asserted that the Union would call a strike without their having a say (only union members in good standing are entitled to vote); that if they refused to join the strike, the Union would discipline them. These were facts Respondent knew were untrue. It then characterized a strike as an economic calamity which would befall the employees' families. To avoid this perceived catastrophe, all the employees had to do was listen to Respondent's advice: get rid of the Union—file for decertification or resign their union membership. Respondent made it convenient for employees to take those steps, providing the names and addresses where they should start, including an advocacy group's website which provided sample forms.

While it can reasonably be said that a strike would have economic consequences for all participants, Respondent was, at the very least, premature. The Union had not even taken a vote to strike and, so far as this record shows, it still has not done so. Nevertheless, it chose to push its employees to begin the decertification process.

b. Edward Carroll

Edward Carroll came to Respondent after a career in the military. He was hired as a correctional officer in April 2000. Initially, like all such officers, he began work as a pod officer. In that capacity he normally worked the day shift, 6 days in a row, with rotating days off. He projects a mature demeanor. In May 2002 Respondent assigned him, and three others, to the two newly constructed courtrooms within the prison. There they were to serve as courtroom officers supporting the immigration judges who conduct the deportation hearings held there. A memo from Assistant Warden Charles Howard, dated May 1, 2002, stated that the four selected officers, Carroll, Cason, Lizarraga, and Maldonado were to be "primary" court officers; six others were to be "secondary." In practice, the secondary officers rarely performed that duty. In fact, only two of those six, Rios and Wallace, ever worked in the courtrooms, although an individual not listed at all, Priebe, was a regular courtroom officer from January through June 2003.

According to Carroll, during a meeting shortly after his selection, Assistant Warden Calderon informed the selectees that their shifts would be Monday through Friday, with weekends off. Furthermore, the secondary officers would replace them only when they were unable to be in the courtroom due to other requirements such as annual training,[4] vacations, or off sick. Carroll found the courtroom work to his liking. The 5-day week, with weekends off, was a marked improvement over the 6-day rolling schedule that came with pod work. He also believed that courtroom work was more prestigious. Except for scheduled vacations and training absences Carroll worked in the courtroom during 2002 and 2003. On the two occasions where he was absent to attend annual training, for scheduling reasons and apparently to maintain familiarity with pod system, he (and, apparently, the other primary courtroom officers) were obligated to return to the pods for about a month after completing the training session.

On October 23, 2003, Carroll took leave for some knee surgery. He was not cleared to return until January 14, 2004. Upon

[4] Each correctional officer is required to take a 1-week refresher class each year. That training requires the correctional officer to be absent from his normal duties for that week.

receiving his medical clearance, he reported to Assistant Warden Howard and Warden Wagner. The following day, Assistant Supervisor Barbara Harper telephoned Carroll at home saying that pursuant to instructions from chief of security, Earl Semler, he would be returned to the pods upon his return to work. Sometime after his return on January 20, Carroll spoke with Semler who told him that working in the pods, rather than the courtroom, had been Warden Wagner's decision; she had rotated Carroll out to train people for the courtroom. He did not tell Carroll how long he would stay in the pods.

Semler testified that he had, shortly before Carroll's return, taken over the responsibility for the courtroom from Howard. He said when Carroll returned he decided to rotate Carroll out in order to train others for the duty, observing that Carroll had been in the courtroom for about a year. When he was asked why Carroll had been selected over the others, he simply said he had to start somewhere. Carroll continued to work in the pods from January until May 2004 when Semler and another supervisor asked him about noon on a Friday to return to the courtroom the following Monday. Carroll, relying on his rotating schedule, which had given him Monday off, had already scheduled Monday and Tuesday for workmen to refinish some flooring in his house, and had to decline. Semler did not assign Carroll to the courtroom beginning that Wednesday, but continued to assign him to pod work until another officer, not identified, transferred to another prison. At that point Semler began assigning Carroll on an irregular basis to the courts. Between May and September he worked in the courts for less than 25 workdays. On September 23, Carroll received a message at his home that he would be returning to the courtrooms. The following day, it became official. Shift Supervisor Thomas gave him a memo saying he would return to the courtrooms on September 26.[5] Semler testified only that "It was time for [Carroll] to go back in." It should also be observed that the reassignment occurred about 10 days before the hearing opened in this matter.

Curiously, there is no evidence that Semler ever replaced Carroll with any new officer. As the General Counsel has observed, the evidence presented by Respondent, through Semler, raises some analysis questions. Semler prepared a chart (R. Exh. 28) showing courtroom assignments covering the period January 2003 through September 2, 2004. One cannot tell from the chart who took over for Carroll when he went on medical leave in October 2003. The chart confusingly suggests that Carroll continued to work in the courtrooms from early September until January 2004. (A note does observe that Carroll was on medical leave). According to the chart, the others who worked during that time were Maldonado, Lizarraga, Wallace, and Chapman. The chart shows that Cason[6] stopped working in the courtroom in early September, not returning until June 2004. It also shows that Chapman, a secondary officer, and Samaniego also worked the courtrooms at times during that period. When Cason came back to the courtrooms in June 2004, so did Rios who had been out of the courtrooms since June 2003, according to the chart. The evidence also shows that Chapman and Samaniego were removed from the courtrooms near the end of May 2004 because they couldn't get along.

All this raises the question of why Carroll hadn't been returned to the courtroom when he returned from his medical leave in January. Semler's explanation, that he sought to train others, really does not stand up to any sort of scrutiny. The chart certainly does not provide any explanation, since no other officer is shown to have been assigned to the courts during the October-December 2003 period. Chapman and Wallace, of course, were originally secondary court officers. They seem to have begun to work in the courtrooms in late December 2003. In March, Samaniego replaced Lizarraga for period, but Lizarraga resumed in May 2004, displacing Samaniego. In June, Rios and Cason reappeared and Wheeler was assigned to the courtrooms for the first time. During the entire time, from January through September, Carroll for the most part remained in the pods. This is truly curious since he was a primary courtroom officer. No specific officer had replaced him and individuals such as Samaniego and Wheeler seem to have been there only temporarily. The chart, far from being helpful to Respondent's explanation, raises more questions about the assignment procedures than answers. What is clear is that Respondent (whether through Warden Wagner as Carroll recalled, or Semler, per his claimed takeover of responsibility for the courts) has provided no real explanation. Certainly Semler's assertion that he was training others rings entirely hollow since no trainee can be seen on the chart.

Similarly, although Carroll eventually resumed his courtroom assignment in late September, Respondent offered no explanation for its decision except for Semler's thin "It was time for [Carroll] to go back in."

c. The discharge of Cruz Mireles

Mireles is called to the Administration Offices

Cruz Mireles, like Carroll, is a retired military non-com. Respondent hired him in April, 2000 as a correctional officer. He generally worked in the pods on the day shift, from 7 a.m. to 3 p.m. As with others on the day shift he routinely attended the morning briefing where the shift supervisor, or an assistant, would make announcements and assign the daily posts for each officer.

As noted, Mireles was one of the principal union organizers, was appointed acting union president, and served on the Union's negotiating committee. He also authored a newsletter to the bargaining unit members advising them of the status of collective-bargaining negotiations. Among his duties as a nominal union official, Mireles became one of the individuals who was recognized as a *Weingarten* representative. Indeed, in late January 2003 Warden Wagner spoke to both Mireles and Carroll regarding what she thought were the appropriate procedures they should follow as *Weingarten* representatives.[7] Mire-

[5] September 26 was a Sunday; accordingly, Carroll did not go back to the courtrooms until Monday, September 27.

[6] Cason was removed from the courtrooms some point during the fall for having slept on the job.

[7] Respondent contends that at a January 29, 2003 meeting certain protocols were reached regarding how Weingarten representation was to be carried out. It points to its own minutes of that meeting (R. Exh. 12) as proof. Neither Mireles nor Carroll had ever seen those minutes before the hearing, much less approved them. Even so, a review of that

les's official union status was well known to upper management such as Wagner, Assistant Warden Charles Howard, and the human resources officials who attended some of the collective-bargaining sessions. Similarly, Chief of Security Earl Semler and Investigator Myron Pitula knew Mireles' union status and duties.

On Friday, February 13, Mireles was routinely assigned to work in unit B as the F pod correctional officer. Unit B, it will be recalled, is the highest security unit at the prison. It is there that Respondent houses about 204 U.S. Marshal prisoners awaiting trial. There are 68 prisoners in each of the three pods. There are four correctional officers assigned to unit B; three pod officers; and one control officer. That day the other two pod officers were Enrique Neri and Mark Thompson. The control officer was John Donahue. Donahue, in his plexiglass perch, was positioned above all three pods and had visual oversight and electronic control of the entire B unit. In addition to those four, Ed Carroll was assigned as the unit B rover. The rover normally escorts inmates to and from videoconferences; he is commonly away from the unit.

At 1:49 p.m., Donahue took a 10-minute break and asked Mireles to relieve him. Mireles did so, leaving his pod and advising the other two pod officers that there were only two pod officers for the three pods. This situation was an everyday occurrence. Under California law, employees in most industries are obligated to take a 10-minute break twice a day.[8] Whenever that occurs the two remaining pod officers cover the other pod.

While Mireles was serving as the control officer, elsewhere in the facility another correctional officer, Alejandro Castillo, had been instructed to go to the warden's office. Castillo was not actively working (he was a transportation officer), but had been in a meeting room undergoing some in-service training. A few days earlier, Castillo had been involved in an incident in which investigator Pitula had become involved. Pitula had earlier asked Castillo to fill out a form known as a 5–1C. Castillo did not know it, but Warden Wagner had determined to discharge him over the incident. Indeed, earlier that day Castillo had spoken to Mireles during lunch and had asked Mireles if he had heard anything about the matter. Mireles responded he had heard nothing.

In any event, Respondent had not informed Castillo about the status of the incident. He did not know whether additional investigation needed to be performed or whether a decision had been made.[9] Upon receiving the directive to go to the warden's office, Castillo passed by the central control station (which is entirely secure from the outside) about 2 p.m. As he did so, he paused to speak to the Central Control officer on the intercom.[10] That individual was correctional officer Ryan Vaught. Castillo asked Vaught to contact Mireles and have him to come to the warden's office. Vaught did so.

Vaught recalled he had opened the door to admit Castillo as he passed on his way to Administration. He remembered Castillo speaking on the intercom, observing that he had been called to the warden's/investigator's office, and that he was in some sort of trouble. Vaught testified:

> [Castillo] stated to me that, 'Hey, I've just been called to the warden and investigator's office. I think I'm in trouble for something. Can you locate Officer Mireles and have him meet me?' I then—I then asked Officer Castillo where Officer Mireles was assigned to. He told me 'Bravo unit.' I then contacted Bravo unit by telephone. Officer Mireles answered the phone. I then told Officer Mireles that Castillo was requesting him in the administration office because he thought he was in trouble for something, and Mireles said something to the effect, 'Okay, I'll make my way downstairs then.' And that was the end of our conversation.

Mireles was not surprised that Castillo had asked for him, given the unsettled nature of the then-pending investigation. Before leaving his post, Mireles had to wait for Donahue to return. He did not have to wait long and he says he told Donahue that he was needed at the administration office. Donahue had no problem and observed that two officers were still on duty in the pods, Neri and Thompson. After Mireles placed a personal article in his F pod locker, Donahue cleared him to leave the unit and opened the appropriate doors. Mireles did not seek a supervisor's permission to leave. Such supervisory permission had not been required previously.

Mireles then began to make his way to administration. To do so, Donahue had to clear him through the unit's staging area and then he had to contact Vaught to open other doors and sliders. Vaught permitted him to proceed by electronically opening those entries and closing them behind him. Mireles recalls the departure little bit differently, but the differences are insignificant.

Indeed, although Mireles had participated in *Weingarten* interviews on a few occasions before, the protocols had not been clearly established. However, in the previous instances (approximately three) Mireles had been notified in the same manner. The central control officer had contacted him in the unit and the unit control officer had released him after making certain there were at least two other pod officers present. As noted above, the same procedures were followed whenever an officer needed to temporarily absent himself from the pod. This happened several times a day: the morning and afternoon breaks, lunch, restroom trips, and the like. Supervisors were never notified; indeed, there is testimony from Neri, Carroll, and Mireles

document only demonstrates that Mireles and Carroll had simply agreed that disciplinary meetings did not call for such representation. The document does not reflect any nuts and bolts protocols such as how Weingarten representatives would be called to such meetings from their posts.

[8] The state law concerning breaks was recently enhanced requiring employers to provide written proof that a break had been taken. A failure to keep records now results in 1 hour's pay to the employee for each unrecorded break.

[9] CASTILLO: "[I] was reporting to the Warden's office. I do not know what for—investigation of an incident prior to—I think it was, on February 6th, if I am not mistaken and I guess that is why I was reporting—"

[10] The Central Control point is a post to which monitors all inmate movement, radio traffic, alarms, and controls all entry and exit points throughout the facility. It is operated by a correctional officer rather than by anyone from supervision. Vaught was not a supervisor.

that the supervisors had affirmatively directed that they not be bothered in such circumstances. In fact, the general post orders state that supervisors are to be notified only if an officer has been unable to take a required break.

The general post orders (GC Exh. 9) are inconsistent on the point. Item I.B. states that an officer may "vacate the post only when properly relieved or instructed by a duly authorized supervisor." Item I.H. (Breaks), after describing the need to take lunch and midshift breaks, states: "It is the officer's responsibility to notify their supervisor when they have not been provided the time or have not been properly relieved to take any of their breaks."

Clearly officers vacate their posts to take breaks and being "properly relieved" has two differing practices. When officers cover for one another for breaks, they regard that (as the must, for there is no alternative) as "proper relief" and it is done without supervisory oversight. Yet "proper relief" at shift change requires an oral status report (turnover) to the relieving officer, together with a log entry.

Written log entries are also made to record some comings and goings as well as nonroutine events which warrant a record. Before the incident in question here, and before the state began requiring records of lunches and breaks, officer comings and goings were not recorded with great care. The practice was not haphazard, but neither was it uniform. Some officers were more assiduous than others. After this incident, Respondent began enforcing the post orders more strictly.

During the few minutes it took Mireles to arrange his absence and walk to the administration offices, Castillo was meeting with Warden Wagner and Chief of Security Semler in the warden's office, behind closed doors. It is undisputed that during the meeting, Wagner discharged Castillo. That process began sometime after 2 pm and lasted approximately half an hour. The first thing Castillo did when he arrived was to ask for a union representative. He wasn't sure if Mireles would be able to get there before the discussion started and he wanted to wait. Wagner denied him the right to have such representation, principally because she knew the meeting was not investigative, but disciplinary, although it is unclear whether she explained her reasoning to Castillo. Under the *Weingarten* doctrine her denial was lawful. *Weingarten* does not extend union representation to circumstances where the discipline has already been determined. Even so, Castillo's request should reasonably have given Wagner and Semler some inkling that Castillo had initially perceived his summons to the office in a manner different than they.

Mireles describes what he did upon his arrival in the reception area:

> [W]what I did was, when I first got in there in the admin office, I noticed that the doors were closed to the warden's office and what I did was I looked. You can see through one of the little windows on the door and there's another window to the side of it, but the shades were kind of drawn. When I looked inside, I saw Mr. Semler, the chief of security, Officer Castillo in the front, facing the warden, and the warden was sitting behind her desk, facing the door. It seems that the meeting had already started. I knocked on the door and I didn't get a reply, so I think I—I'm pretty sure I knocked again and the next thing I saw was Ms. Wagner basically looking down at the sheets of paper and waving my (sic) hand, like this, like to go away, but she didn't once look up to see who it was.

Confused, Mireles then sought assistance from one of the clericals, who also tried the window unsuccessfully and then used an intercom phone to contact Wagner. The result was the same; Wagner declined to respond. As a result, Mireles took a seat in reception area and waited. After some time passed, at least 20 minutes, the warden came out, apparently to use the copy machine, and Mireles asked her if he was needed. She asked him who had called him there. He says he replied "Central Control." She responded that she hadn't called him and then asked Semler if he had done so. Semler said no.

Warden Wagner testified that Mireles told her that he had been called either by "Chief Semler" or "admin 4," a radio code for the security chief. Semler gave similar, but slightly different, testimony: "When I asked him who told him that I called him to the scene he informed me that the Control Center told him."

In context, neither Warden Wagner's testimony nor the corroborative support given her by Semler makes any sense. In fact, Semler partially supports Mireles, here, putting Control Center in the middle of the process. There would be no need for Mireles to claim that Semler had called for him. He knew Semler had not; it had been Castillo through Vaught. From Mireles's point of view, there was no need to lie. Insofar as he knew, he had followed a routine procedure. There was nothing to lie about.

After some discussion, Semler told Mireles to return to his post. As Mireles made his way back he encountered Supervisor Roland Small who asked him if they were done with their breaks in unit B. Mireles replied that they were, whereupon Small instructed him to go to unit J and relieve the unit control officer there so that unit's officers could take their breaks. Following Small's directive, Mireles went to unit J and logged in at 2:50 p.m. He remained at unit J until he was relieved shortly before the end of the shift. He returned to unit B at 3:30 p.m. just as his relief officer was signing in on the logbook. He says he turned F pod over to that officer and then left for the day.

In the meantime, shortly after Mireles had responded to Vaught's call for him, Neri had become aware that Mireles was not in his pod. He spoke about it to Donahue, learning that Mireles had gone "downstairs."[11] Thereafter both Neri and Thompson covered Mireles' F pod in the routine manner they normally did during a fellow officer's absence. Nothing out of the ordinary occurred during that entire time frame, from about 2:10 to 3:30 p.m. Had Supervisor Small not diverted Mireles to J unit, Mireles's absence would have only been about 35–40 minutes. Due to that diversion, he was gone from his unit B post for 80–85 minutes.

[11] Donahue did not know how long Mireles' meeting would take. He may not have immediately informed Neri and Thompson of Mireles' absence.

Respondent Conducts an Investigation

As soon as Mireles left the office area to return to work, Warden Wagner directed Semler to investigate why Mireles had come to Administration. She also wanted to know why Mireles had said that Semler/Admin 4 had requested him to be there. Semler proceeded to do so, collecting witness statements, using the 5–1C forms.

Almost immediately Semler asked Central Control officer Vaught if he had called Mireles to administration. Vaught replied that he had done so pursuant to Castillo's request. Semler also asked Vaught if he had called a supervisor before doing so. Vaught responded that he had not. The following Tuesday, February 17, Semler asked Vaught to fill out a 5–1C concerning how and why he had called Mireles to Administration. Vaught did so; in that statement he said that Castillo had asked Mireles to meet him in Pitula or Warden Wagner's office. After Semler finished reading Vaught's 5–1C, he asked Vaught to add another sentence: "At no time did I tell CO Mireles that Chief Semler requested him in the administration offices."[12] Semler concluded his meeting with Vaught by telling him that in the event anything like that happened again he should first call a supervisor before clearing the employee to leave his post. Vaught was not disciplined over the matter.

Until Friday, February 20, Mireles was unaware that the incident was being investigated. That day he received a directive to go to the administration office. After being relieved, leaving two officers in the pods as before, he went to Investigator Pitula's office. When he arrived both Pitula and Semler were there; shortly thereafter a human resource officer named Frank joined them. Semler then directed Mireles to write a 5–1C concerning what happened on February 13. Mireles, unclear regarding what was wanted, replied he could not recall everything that happened on that day, then a week past. Semler then demanded to know who had given Mireles permission to leave his pod that day. Mireles answered he had not asked for permission from a supervisor; that he had never needed permission before, so long as two corrections officers remained in the unit together with a control officer. Semler told him to fill out a 5–1C.

It was not until Semler insisted upon an immediate 5–1C that Mireles realized he was under investigation for having abandoned his post and might be subject to discipline. He then turned to the HR officer, Frank, and told him that what they were doing was wrong. Frank declined to speak and shortly thereafter left the meeting.

At this juncture it is appropriate to observe that Semler generally does not permit any person being required to fill out a 5–1C time to think about it. He insists the document be filled out then and there.[13] As an investigative technique this has both advantages and disadvantages. The principal advantage is that a witness is more likely to be candid since he or she does not have sufficient time to think of a lie. The disadvantage is that the witness is often forced to write too quickly about a situation that may require more detail than can be provided on such short notice or that the witness becomes disconcerted and unable clearly to understand what is being asked for and thereupon omits significant facts; indeed, whenever witnesses do not understand what is being sought they may write an irrelevancy which risks being misinterpreted. Beyond that, unless the writer has some idea of what information is being sought, he really has no way to answer intelligently.

Here, Mireles became somewhat disconcerted. He had no idea that he had done anything wrong. All he could see was that Semler was pursuing him, even pressing him. Semler had continued to demand to know what supervisor had sent him; and he had continued to respond that Central Control had called him and that he had been properly relieved when he left.

Upset, Mireles proceeded to fill out the 5–1C. In its entirety it states, "I was working in B/F [unit B, pod F] when I was told by control to go down to the warden's office, and that CO Castillo wanted me down there. I was relieved by another pod officer. And I came downstairs and was relieved by other officer (sic) any other pods in the B unit." In this connection, Semler testified that during the course of his investigation Pitula had told him that he also utilized central control to contact Mireles on the occasions where employees had asked for union representation. Usually that happened after Pitula first contacted the supervisor. [In a testimonial anomaly, Pitula testified that he did not know what steps supervisors utilized to call the union representative to his office when he requested their presence.]

Semler then began to canvass other employees and supervisors. These included Correctional Officers Thompson, Neri, Carol, and Donahue. He also obtained statements from several other individuals such as Supervisors Williams, Thomas, and Small and the secretary to Warden Wagner, Beverly Soria. Wagner herself provided two memoranda (both listed as attachment 9 to Semler's investigation report).

Many of these statements demonstrate the shortcomings of Semler's approach in requiring 5–1C's without direction. Neri is a good example. In this instance Semler initially delegated the duty to Assistant Warden Clover. Neri recalls that on February 20, Clover came to him with a blank 5–1C directing him to write any incident that happened on February 13. Neri couldn't remember February 13, from any other day and asked for a copy of the daily log for that day. Clover told him he couldn't see it and directed him to write what he remembered. In the 5–1C Neri complained that he couldn't remember much about February 13, without a logbook. He wrote "I can't honestly say if I ever was in the control room on 13 Feb 2004. I have no recollection if I received and or made a phone call. . . ." Apparently because he complained about his inability to review the logbook, Semler met with him later and showed the February 13 log entries to him. Neri testified Semler asked him if he thought it strange that Mireles had been gone for over 2 hours.[14] Neri replied that such a situation was pretty normal

[12] Vaught's 5–1C is the third attachment to R. Exh. 27, Semler's investigative report.

[13] An exception might be permitted if the person was engaged in something critical; even so, that person would be required to fill one out by the end of his workday. This circumstance seems to have been rare.

[14] Semler was exaggerating here.

given the fact that they were understaffed. Neri's testimony is in the footnote.[15]

Donahue is the only witness with percipient knowledge who was not called to testify. Semler's report includes a 5–1C written by Donahue which is undated. In its entirety it states: "I CO J. Donahue do not have any recollection of anyone calling or notifying me to send CO Mireles to Admin office while I was posted in B unit control on Feb. 13, 2004." He added a postscript: "I do not recall telling CO Mireles that he was wanted in Admin." Since Donahue did not testify, there is no record evidence regarding the manner in which the 5–1C was adduced; nor is there any explanation for how the postscript came to be added. One cannot know whether Donahue was ever asked if Mireles had told him he had been called to the office or whether he said the call was from Central Control. However, Semler already knew from Vaught that Vaught had done so upon Castillo's request. In any event, as counsel for the General Counsel notes in her brief, Donahue's 5–1C does not support Semler's later conclusion that Mireles left the unit without Donahue's knowledge and tacit approval. Indeed, how would Mireles have been physically able to get to the staging area without Donahue's assistance?

Nevertheless, Semler, disingenuously in my opinion, came to believe that no telephone call had been made to Mireles calling him to administration. Being kind to his version, Semler seems to have confused 'unit control officer' with 'Central Control officer.' Mireles had said in his 5–1C that he was told "by control" to go down to the warden's office. As Mireles explained, he was speaking of a telephone call which came to him from Vaught, the central control officer. He certainly was not writing about anything Donahue had said or done. Indeed, he had been serving as the unit control officer at the time Vaught called unit B. Semler knew that, particularly given the fact that Vaught had acknowledged making the call and reaching Mireles. Semler's testimony is a bit strange on the point, because he asserts that Mireles "had informed me that he hadn't personally received a phone call, but his control center officer told him to report down there." Similarly, but slightly different, is Semler's report: 'Mireles' first statement was that he was told by his control officer to go to the Warden's office. He denied taking the telephone call from Central Control.' Neither assertion is true. Mireles had received the phone call and he had received it from Vaught. Both he and Vaught so testified and Vaught clearly so stated in his own 5–1C. The only ambiguity which can be found here is in Mireles's 5–1C where he doesn't describe significant 'control' as the Central Control. There could have been no confusion over his usage since he himself was the unit control officer at the time the call was made and Semler should have understood this, if from nothing else, Vaught's statement that he had called Mireles in unit B, because pod officers do not have direct phone call capability. Moreover, the log book should have given him reason to believe that Mireles had been serving as the B unit control officer at the time the call was made. Certainly Donahue's inability to recall, as set forth in his 5–1C does not mean that Donahue was unaware that Mireles had gone to Administration or that Mireles had been called there by Central Control.

One wonders what sort of interview Semler conducted with Donahue. Did he simply demand that Donahue write his recollection without any prior discussion of what had happened? Furthermore, there is no showing when the interview occurred; Donahue's 5–1C is undated. How much time had passed between incident and the request? Was that before or after Vaught's 5–1C on February 17? Was it before or after Mireles's 5–1C on February 20?

Semler's conclusion, that Mireles did not inform his fellow officers that he was leaving the unit, set forth in the conclusion paragraph of his investigation report, is not supported by the facts set forth therein. Indeed, the facts demonstrate that Semler knew or should have understood that Donahue knew Mireles had left to go down to Administration.

Semler's next conclusion is that Mireles lied when he told Warden Wagner and secretary Beverly Soria that he been called to the warden's office by Semler. This conclusion, too, fails the logic test.

It is true that both Warden Wagner and Secretary Soria stated both in their investigatory documents and later in testimony that Mireles told them that Semler or Admin 4 had called him to the office. Semler, who was there at the time, knew he had not done so and also knew Mireles had said Central Control had called him. More importantly, Mireles never thought Semler had called for him. Aside from Castillo, Mireles did not know which, if any, manager was involved. Even if at some point he speculated that such a manager was Semler, his speculation would have been clear. But it is unlikely that such a speculation took place. Since Mireles had been coming to the office in response to a *Weingarten* request, any speculation would more likely have targeted Pitula, the investigator or possibly Warden Wagner. The likelihood that Mireles referenced Semler in some manner is zero; Semler was not on the radar. Mireles had no need to make such a claim and would not have done so.

This raises the question of why Warden Wagner said that Mireles did claim Semler had called for him. She did so in both her February 13 memorandum and her February 16 version. She also gave testimony consistent with the two memoranda. Either she misunderstood Mireles or she lied. I am also unimpressed with Soria's supporting testimony since her 5–1C was not given until February 20, and there is no testimony or explanation regarding what she had come to believe and how she came to believe it. I think she now believes it to be true, but in all probability she had heard Wagner's version a sufficient

[15] NERI: "He asked me pretty much is those my log entries, why didn't I log in, and it's like, well, I'm just taking over the log entries, I'm not taking over his pod, Mr. Mireles hasn't left the facility yet. After that, he's writing notes on paper. I'm not too sure what he was writing on, but the main question that he asked me was wasn't it strange that he was gone for over two hours. At the time, we were still so understaffed that it was normal for an officer to be gone for over a long period of time, especially, if that our last officer was relieving the control officer for lunch. That was an automatic one hour minimum that he was going to be gone prior for him to coming back to the floor and assuming his own log entries . . . I pretty much answered all his questions and just told him that it was normal at the time to be gone for so long periods of times."

number of times to have come to believe it to be accurate. Certainly she is in no position to challenge such a powerful boss's view of things.

Wagner's version is not, and cannot be considered, trustworthy. There are several reasons for my conclusion. First, she was aware that Castillo had, prior to their discussion, asked for a Weingarten representative. She knew Mireles served in that capacity. When she exited the door to go to the copy machine and encountered Mireles, she knew even before Mireles spoke, that the very person Castillo had asked for had appeared. She also knew that someone had been trying to get into the office, but she had waved that person away. Most likely there was a connection between Mireles' unexpected presence and the person attempting to interrupt the meeting. Furthermore, she agrees Mireles approached her and asked if she needed to see him. She knew then that Mireles believed he had been summoned (if not by her, by someone else in that area). Despite these clues, she says she did not connect Mireles' *Weingarten* duties to the Castillo meeting. This was probably because she knew the meeting was not investigatory, but disciplinary, and that Castillo did not have a right to union assistance in that circumstance.

This is consistent with Mireles's testimony: "Well, when Ms. Wagner came out of the room, I asked her, I says, 'Excuse me, ma'am, am I needed here?' And she goes 'No, I didn't call for you, who called for you?' I said 'Central Control told me to come down here. I was told by Central Control to come down.' 'Well, I didn't call for you.' And that's when she looked at Mr. Semler. Mr. Semler came out of the warden's room and said 'I didn't call for you, who called for you?' And I said 'Central Control told me to come down.' And that's all I—that's all he kept saying was 'who told you to come down here?' And that was Mr. Semler. And he goes, 'Well, we don't need you here.' I said, 'Okay, fine. So I walked back. . . . '"

Clearly Mireles' answer was accurate as far as it went. For some reason, even though he knew it was Castillo who had called for him, he did not say so. I believe, given the quasi-military atmosphere and his long military training, he answered the question as put, rather than attempting to explain. From his point of view, someone in administration knew why he was there. He did not need to explain. He no doubt thought Castillo had followed procedures and that someone in Administration was aware of it. No one asked the obvious question: "Why are you here?"

I find that this circumstance led to a grave misunderstanding. It was exacerbated to some extent by Warden Wagner's supposedly misunderstanding him to say that Semler had called for him. She should have understood from Semler's reaction that he had not done so and that Mireles had not said that he had. Mireles' only claim was that Central Control had sent him.[16] Semler had nothing to do with it. Instead of taking a moment to examine the situation a little more carefully, Wagner directed an investigation. (WAGNER: "After Mr. Semler finished with Mr. Castillo, taking him over to—turning him over to human resources, I asked Chief Semler what he thought Mr. Mireles had come down here for and why—you know, if he had not called for him, why was he in this area? I asked him where was Mr. Mireles working that day that he could be down in the administration building at that time rather than on his post. And Chief Semler indicated he didn't know, but he would go find out. I asked him—Mr. Semler, to check it out and find out what occurred why Mr. Mireles showed up telling us that Chief Semler or Admin Four had called for him when, in fact, he had not." (Emphasis supplied.)

In the time it took for Semler to take Castillo to human rsources and return, Wagner had done some thinking. Upon his return, significantly, Wagner put two questions to Semler: why had Mireles come to Administration and why had he lied about who had called him. This conflation of issues is telling. If the first question was satisfactorily answered, the second would be recognized immediately as someone's mistake, assuming Wagner's claim that Mireles lied is not itself fabricated. Nevertheless, her question asserts as a fact that Mireles had lied. Given that starting point, what other conclusion could Semler have reached? Moreover, wasn't that a signal to Semler regarding the finding she wanted made? It denied Semler the option of finding that a misunderstanding had occurred.

It should be observed at this point that the entire incident is intertwined both with Wagner's efforts to undermine or otherwise get rid of the Union. Wagner had begun her effort to induce a decertification petition in early October 2003 and her effort can be seen as ongoing as recently as January. One union official, Carroll, who Wagner undoubtedly had hoped would not return after some surgery in October 2003, had reappeared for work only 3 weeks earlier.[17] Furthermore, the decertification petition, Case 32–RD–2772 must have been in the works. Although the petition was not filed until March 19, as Wagner had suggested in one of her postings, she would likely be aware of such a movement. After all, she was attempting to ignite it. Accepting, as she implied, that she had a good ear for what was happening in the facility, it seems likely that she was aware that steps were being taken to perfect such a petition. Clearly, if she could justify ridding the prison of one of the union officials, such a step would assist her in reaching the goal of ousting the Union. Furthermore, it seems fairly clear that she did not want the Union to succeed in its representational duties, specifically Weingarten responsibilities. She simply did not want to allow the Union to portray itself as having been successful in any way. Accordingly, it is no great step to conclude that Wagner quickly saw that she might be able to characterize Mireles' appearance at the administration office on February 13, as some sort of misconduct. It was an opportunity to get rid of an individual whose organization was regarded as a hindrance.

Having such a mindset explains why she gave Semler the pointer she did. Likewise, the conclusions which Semler reached are unsurprising given Wagner's instantly conceived stratagem.

However, Semler's investigation provided additional fodder for the discharge. Most of it was makeweight. For example, Semler determined that no supervisor had authorized Mireles to

[16] Did Wagner mishear, mistaking the word "Central" for "Semler?"

[17] Carroll, it will be recalled, had come back to the facility with his certificate of fitness on January 14. Respondent put him back to work in the following week, on January 20.

go to administration. In large part, of course, the observation is an irrelevancy. Semler knew Vaught had called for Mireles. He also knew that an instruction from Central Control carried its own authority, being a normal supervisory relay. He knew Vaught had made the mistake, but that Mireles could be saddled with it. Similarly, he knew Mireles had left the post with Donahue's knowledge—if only to permit Mireles to exit the unit. Nevertheless, he wrote that Mireles had left without the unit control officer's knowledge. This was a distortion of the actual situation. We know, for example, that shortly thereafter, Donahue told Pod Officer Neri that Mireles had gone 'downstairs' and Neri immediately began to cover Mireles's F pod in the routine way he always did when one of the three pod officers had to leave. Furthermore, Semler said Mireles had left his post without formally being relieved. Yet, what Mireles had done was routine. He knew Donahue would see that his pod was covered. All three of those officers testified it was normal for two officers to cover the three pods temporarily. Mireles left with the knowledge that the routine would be followed.

Despite learning those facts, Semler found Mireles at fault for following these regular practices. And, it is true that the standing post orders, somewhat contradictory, could be interpreted to bar the routines which these, and apparently most, pod officers were following. It was not until after this incident that management began to crack down. Yet the practices were standard operating procedure when the incident occurred. Making Mireles the fall guy for following procedures that were widely tolerated, if not encouraged, seems extreme when lesser management tools (e.g., admonishment and/or staff memo modifying the practice) were available. Discharging an employee for what was not regarded as an infraction suggests that another motive was in play.

But Semler was not done. He concluded his report by saying that Mireles had remained in "lower administration for thirty minutes or more, then did not return to his unit until almost 1500 hours (3 p.m). He left his pod vacated for over an hour."

As I parse what he wrote, I must observe that it is inaccurate in several ways.[18] The thrust of his conclusion (allowing for some credit to Mireles for being sent to unit J) is that he had somehow spent "thirty minutes or more" in lower administration and "left his pod vacated for over an hour."

While almost true, it unnecessarily inflates the situation beyond fairness. First, it does not give Mireles credit for the period of time between Donahue's apparent return at about 2 p.m. (Mireles had assumed Donahue's unit control post at 1:49 p.m. to cover Donahue's 10-minute break) and when Mireles actually departed for administration. That clearly took 5 minutes or so. And we need to allow for the time he spent in the office waiting for a resolution of his summons. Small reports that he encountered Mireles at about 3 p.m, but the J unit log (GC Exh 16)[19] shows Mireles to have logged in there at 2:50 p.m. Allowing time for Mireles to depart lower administration, encounter Small, respond to Small's inquiry and walk over to unit J would seem to have taken about 10 minutes. Thus, he must have encountered Small at 1:40 p.m. or earlier. This would mean that Mireles's absence from unit B would be in the neighborhood of 40–45 minutes. I suppose it might be said that Semler's 'over an hour' exaggeration is not very great. Still, it demonstrates that Semler is willing to stretch matters in order to put the strongest face on his report for Warden Wagner. It is a subtle effort to strengthen an otherwise weak case.

The Briefing Room Incident

As noted earlier in this decision, at 7 a.m. each morning, Respondent's supervisors conduct a preshift meeting. The meeting is usually led by the shift supervisor or his assistant. Normally, about 40 correctional officers, together with other supervisors, attend. On February 21, Assistant Shift Supervisor Barbara Harper was in charge of the meeting. She advised the staff of their assignments for the day and then turned the meeting over to Senior Correctional Officer Roland Small. She says he was speaking to the staff about the necessity for officers to identify themselves properly on the intercom when speaking to the control center. She said that Mireles interrupted Small's remarks in a disruptive way. According to her, "he cursed, he used the F word, 'listen up, listen to what he is telling you. I am under investigation for abandoning my post.' He got to, 'if you are pulled from your assignment make sure you call your supervisors. . .' 'She asked Mireles to stop at that point and he did so. She also testified that when Mireles made his statement that there was an audible reaction from the group—she described the reaction as "oohs and aahs."

Small's testimony is only a little different. Small testified that he was in the process of explaining that officers who were leaving their unit needed to perform a "pass down" similar to the sort of formal relief "pass down" which occurs at the beginning and end of each shift. This change would require a log entry to be made. He remembers being interrupted by Mireles. Small said: "As I was giving that instruction out, some of the officers came back and said, 'well, they are letting us out without—they are letting us out without—' they asked the question and I was explaining to them that you got to notify them and Mr. Mireles jumped up, got excited and said, 'Listen to what the fuck he is saying because they are trying to get me' . . . Everyone was startled that he was doing that."

Mireles testified that it was Harper who was speaking at the time he interrupted. He remembers Harper

> [Started] to talk about it, the briefing, she started to mention about that we are weak in our logbook entries, that certain things are happening we need to brush up on, we need to do make sure that we do proper entries, times, and dates. And, at that time, I noticed that everybody was kind of like not paying attention to her. They were more or less just grabbing (sic) [gabbing]—just looking at each other and not paying attention at all and it upset me very much and I stood up and I said "This is bull shit." I said "You guys need to pay attention." I said "She's trying to make you understand how not to get in trouble like I'm getting in trouble." And everybody just basically stopped and you could hear a pin drop. And, at the same time I was saying everything, I could see Ms. Harper kind of

[18] Oddly, some of Semler's inaccuracy actually favors Mireles, i.e., Semler's statement that Mireles returned to his unit at 1500 hours (3 pm). Mireles actually did not return until about 3:30, having been occupied in unit J until pursuant to Small's instruction.

[19] The copy of the log attached to Semler's report is illegible.

like shaking her head up and down, saying kind of like, to me, it was agreeing with me.

Correctional Officer Enrique Neri remembered that the supervisors were speaking of logging in and logging out when Mireles spoke. His testimony:

> Q. [By Ms. CAHN) . . . And at this meeting do you recall if Cruz Mireles spoke up?
>
> A. [Witness NERI] I recall he spoke up and was directing everybody, not just one person in the room, about logging in and logging out of your books because he was being investigated about it. He was under investigation for the not logging in and logging out.
>
> Q. Do you remember exactly what Cruz Mireles said at that meeting?
>
> A. It's just in general that saying log in and log out, I'm under investigation for this stuff, and, as far as if like you use (sic) [he used] profanity or not, I'm sure he used a word or two. I just can't—the exact word I don't know.
>
> Q. Do you recall what word it might be?
>
> A. I recall it might be shit or another word like, you know, bull shit or something like that. But just the shit part is the part I remember that he did, you know, say something in that manner, but it wasn't in a—it wasn't directed at nobody. It was just a general sentence that everybody knew what he was talking about. Not directed at anybody. Just broad.
>
> Q. And what happened after Cruz Mireles said this?
>
> A. After Cruz Mireles said it, everybody was listening, he said that he finished what he was going to say. He sat down.

On cross-examination Neri acknowledged that Mireles's language may have been more coarse. He said:

Q. [By Mr. PARKER] Right. And you indicated that you heard him say shit. Is that right?

A. Shit or other words connected. I don't know if it was bull shit or fucking shit or whatever, but the word shit came. That's one of the words I recall.

Q. So it could have been fucking shit?

A. I could have been anything. The exact word I don't know.

Q. You don't remember?

A. No. Like I say, profanity, yes. The exact word, the exact saying, the exact sentence—

Q. So you would agree—

A.—I wasn't writing nothing down.

Q. So you would agree that it was profanity, but you just can't remember all the words?

A. No. I can't remember the whole sentence itself.

Ed Carroll was also present during this incident. He testified that the correctional officers were not paying much attention to Harper as she spoke and were treating her directives casually by talking among themselves, not really paying attention to what she had to say. His recollection regarding what Mireles said is not strong in detail but Mireles said, "Shut the hell up or something like that. I cannot remember."

All seem to agree that at least some level of profanity was used. There is also general agreement that whatever supervisor was speaking he or she was focusing on a procedure change and that the staff was not giving it the proper attention. Mireles, of course, was by then aware that Respondent was considering disciplining him concerning, among other things, the manner in which he had left the unit on February 13. He knew he was being accused of failing to properly log out of the unit. He also knew that others commonly followed the procedure he had used and that Respondent was asserting that the logbooks needed to reflect such comings and goings. He could see that the supervisors were making a change and that the staff needed to understand it. If they did not, he could foresee others finding themselves subject to the same sort of discipline for which he was being scrutinized.

Mireles readily acknowledges interrupting Harper. He wanted to emphasize her point, but could see that the group was not paying proper attention to it. Using an imperative tone, he quieted them with a profanity and told them that failing to follow her instructions could result in their becoming subject to the same sort of discipline he was undergoing.

It should be observed here that Mireles, Carroll, and Neri all testified that profanity was not uncommon in the facility, nor was it unknown during the morning briefings, even uttered by supervision. Respondent does have a policy against the use of profanity and has enforced it in the past, usually by a written warning. The policy is also applied toward the inmates' use of such language. Generally speaking, the policy (though not always its enforcement) seems to be aimed at abusive profanity, rather than casual vulgarity. Even so, Respondent seeks to minimize its use, if for nothing else, to maintain a professional atmosphere.

Nevertheless, it appears that Mireles' demeanor, strong language or the news of his being investigated did attract the attention of everyone in the room. Indeed, after a pause, the meeting ended and the employees left for their duty posts.

Shortly after the meeting was over, Harper mentioned Mireles' comments to Shift Supervisor Jerome Williams. Williams suggested that she speak to Mireles privately and admonish him. She did so and during their meeting Mireles acknowledged that he had been in error to have used the language. In the meantime Williams mentioned the matter to security chief Semler. For reasons that are not testimonially clear, Semler decided to pursue the matter further. He was, of course, in the process of finishing his investigation report concerning the events of February 13. He promptly asked a number of supervisors to fill out 5–1C's concerning what had happened in the briefing. As result, he learned what Mireles had done. He also learned that Harper had already admonished Mireles. Despite his receipt of the 5–1C's Semler actually interviewed no one, including Mireles. Thus, the conclusions he reached are based simply on the material contained in the 5–1C's and not on any independently derived information.

According to Mireles, a day or so later, he was working as the unit control officer in unit B when Supervisor Small came to him holding a 5–1C form and asked him to complete it, describing what had happened at the meeting. Mireles, then busy with his unit control duties—answering phones, controlling the

doors, monitoring the pods and recording log entries—begged off for the moment, saying he would write it later. Small then asked Mireles if he was refusing to write the 5–1C Mireles answered that he was not refusing, but would fill it out later. Small left, taking the form with him. Small did not repeat his request later and Mireles did not fill out 5–1C.

Small denies that he ever asked Mireles to fill out a 5–1C. Indeed, Respondent offered the testimony of Shift Supervisor Williams. Williams testified that after he had heard of the matter from Harper (that Mireles "was cursing in briefing, being unprofessional"), he called Mireles at his unit control post. He testified: "I told Mr. Mireles, 'I need a 5–1C from you for the incident that occurred in the briefing room.' He said, 'I am not providing a 5–1C because [they are out to get me] anyway.' I said, 'That is fine. I can't make you write one."' [20] Williams asserts that Mireles, by his response, refused to fill out a 5–1C.

On February 23, Williams filled out his own 5–1C regarding Mireles's supposed refusal. He wrote: "On 2-23-04 at approximately 0920 I gave a direct order to Officer Cruz Mireles to write a 5–1C statement about the incident that occurred on February 21, 2004 at approximately 0700. Officer Mireles refused to write a statement."

Mireles denied that such a conversation with Williams ever occurred. He testified:

> Q. [By Ms. CAHN] Okay. Now on February 21st, 2004, that was at the briefing, afterwards were you asked by a Jerome Williams to write a 5–1C?
>
> A. [Witness MIRELES] No, ma'am.
>
> Q. Do you recall receiving any telephone call from Mr. Williams—
>
> A. No, ma'am.
>
> Q.— asking you to fill out a 5–1C?
>
> A. No, ma'am.
>
> Q. Did you ever tell Mr. Williams that you're not going to write a 5–1C because they were out to get you, anyway?
>
> A. No, ma'am.

Mireles testified that the only person who asked him to fill out a 5–1C concerning the briefing room incident was Small, as described above. Small, as noted, denied that he had ever asked Mireles to do so.

This appears to raise a credibility resolution regarding what actually occurred with respect to the 5–1C request. It seems significant principally because when Respondent discharged Mireles on February 24, it cited the profanity, the supposed refusal and the February 13 events. Even so, as will be seen, it is not necessary to resolve the credibility conflict concerning Mireles' supposed refusal to fill out the 5–1C.

In the so-called problem solving notice (the internal form which Respondent uses when it resolves an employment-related incident) Semler wrote, addressing Mireles: "On February 21, 2004, during the shift briefing you used obscene language and displayed unprofessional conduct. Later when your supervisor requested a written statement, you refused to provide the statement." In the recommendation line, Semler recommended "termination."

Thus, in his two recommendations written February 23, Semler recommended to Warden Wagner that she discharge Mireles.

Wagner testified that in making her decision to discharge Mireles she relied on three principal factors. The first was Semler's recommendation for discharge for the 'post abandonment' material, including Mireles' supposed lying. The second was Semler's problem solving notice concerning the briefing room incident and the supposed refusal to fill out the 5–1C form. Finally, the third was a general review of Mireles' employment history that included two earlier and lesser forms of discipline. One of those was ancient history.

The earlier punishment was a 5-day suspension without pay in September 2001. That incident involved an accusation that Mireles had sexually harassed a female employee at a company picnic. It appears that Mireles had become involved in a horseplay water fight in which he had thrown a water balloon at the female employee and hit her in the chest area. A supervisor had recommended that he be discharged, but Warden Wagner reduced it to the suspension. At the time of his discharge the incident was 2–1/2 years old.

The second discipline was a 2-day suspension without pay in April 2003 for an incident during which Mireles and another employee verbally argued with one another concerning some work duties and that Mireles used profanity. It appears that both involved officers behaved inappropriately. The supervisor recommended a 3-day suspension, but Warden Wagner reduced it to 2 days. At the time of his discharge the second incident was 10 months old.

It is undisputed that Respondent has no written personnel policies concerning discipline. It does not follow any sort of progressive disciplinary system. The handling of the two earlier disciplinary incidents demonstrates a certain built-in arbitrariness. The first, although initially characterized as sexual harassment, clearly was nothing of the sort. Indeed, it is the type of horseplay that might be found at any company's summer picnic. The supervisor nonetheless recommended discharge; the warden recognized that the recommendation did not fit the misbehavior, if any, and wasn't worthy of discharge. The entire incident might well be characterized as boisterousness. Nevertheless, it resulted in a 3-day suspension. The second, more serious in my view, was a loud, angry, unprofessional argument between two correctional officers concerning their duties. Not only was it unprofessional, it involved ad hominem accusations and some profanity, though uttered in apparent disbelief (that's bullshit!). This was disruptive of the operation, particularly since it took place in the dispensary. Yet the incident drew only a 2-day suspension.

These may be contrasted with the written reprimand given Officer Alvarez in June 2001 for a verbal altercation with another officer, in which he used two profane words "mother f**ker" and "bitch" and the written reprimand given Correctional Officer Moore in June 2001 in which he engaged in a verbal argument with another officer using profanity ("[I'm] not doing your f**king job for you . . . I'm sick of your sh"). In addition, there was a 1-day suspension of correctional officer

[20] The material in brackets is a correction of a transcript error.

Leach in February 2003 in which the officer 'engaged in a loud and unprofessional exchange with another officer in the presence of inmates and contract staff.')

As can be seen, there is little consistency about the manner in which Respondent approaches its discipline insofar as it relates to either profane language or verbal altercations between staff members. In fact, is not even clear that Respondent considers whether the language is ad hominem or simply an angry utterance. Surely profane insults and name-calling are of more concern to the goals of professionalism and a contented workforce than the occasional undirected oath of frustration. Yet, that does not seem to be the case with this employer.

Similarly, the post abandonment disciplines are inconsistent as well. In October 2002, Correctional Officer Lockhart was discharged because he abandoned his pod "on numerous occasions and made several outside phone calls. . ." In October 2003, Correctional Officer Duarte was discharged because he "abandoned his post without being properly relieved." In November 2003, Correctional Officer Espinoza was given a 1-day suspension because she "abandoned her post in intake by refusing to continue working and by leaving the area."

In any event, Warden Wagner says on February 24 she considered the two reports and Mireles' disciplinary history before making her determination. She also added that she considered the fact that Mireles had supposedly not been properly relieved on February 13, when he left to go to the administration offices. She clearly concluded that Mireles had lied when he supposedly told her that he had been requested to come to administration by Semler (whether by name or by radio code). Furthermore she accepted Semler's finding that Mireles had used obscene language during the briefing and that he had refused to fill out a 5–1C when Williams directed him to do so.

About noon on February 24, Mireles was summoned to the warden's office. Present were Warden Wagner and Assistant Warden Howard. They told him that he was being terminated for abandoning his post, making a false statement and using obscene language during the morning briefing. They asked him to sign copies of problem solving notices having those conclusions. He declined. It seems clear from the testimony that Warden Wagner did not go into any great detail concerning his supposed transgressions nor did she mention any previous discipline.[21] Mireles then left.

[21] Also not mentioned was certain material concerning Mireles' two applications for employment in September and October 1999. At the hearing, Respondent sought consideration of certain supposed falsehoods, which if known at the time, would have disqualified him from employment. Warden Wagner claimed that she had, during the preparation for the case, learned that some of the answers Mireles had given in the forms were false. I barred testimony on the issue after learning that the material was not newly discovered, that it had been considered by Wagner's predecessor Warden Reavis, his investigator Chacone, and by the U.S. Immigration and Naturalization Service investigator. They had determined the material to be accurate in the circumstances. Those issues were thoroughly vetted and Respondent hired Mireles with full knowledge of them, all of which Wagner now says were disqualifiers. Wagner may have been unaware of the answers and their explanations, but the material was far from being newly discovered. Mireles' answers had been scrutinized by the background investigation authorities and had passed muster.

IV. ANALYSIS AND CONCLUSIONS

The first issue to be decided is whether or not Respondent, through Warden Wagner, unlawfully stimulated or sparked employee interest in either disavowing the Union or filing a decertification petition. The law does permit an employer to engage in the ministerial act of providing either addresses and telephone numbers of local NLRB offices to employees who ask about the mechanics of decertifying a bargaining representative [*R. L. White C.o.*, 262 NLRB 575, 576 (1982)] or limited clerical assistance [*Mobile Home Estates, Inc*., 259 NLRB 1384, 1395 (1982)]. It does not permit the employer to initiate, urge, or involve itself in the process. An employer may not provide assistance beyond the absolute minimum. However, employers are permitted to provide information about the law in answering such questions so long as their communications are free of threatened coercion or promises a benefit. The Board has long considered an employer's undue involvement in sparking employee interest in decertifying the incumbent union or otherwise hamstringing it from within (urging resignations, dues checkoff cancellations and the like) to be an unlawful interference with the employees' Section 7 rights. See generally *Texaco, Inc*., 264 NLRB 1132 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984) where the Board said, at 1133:

> Considering the course of events described above and the entire record herein, we agree with the Administrative Law Judge that "Respondent did not maintain a neutral position here, and it obviously went further than simply answering inquiries of employees." After learning from Sutton of employee dissatisfaction, Respondent initiated and stimulated the activity that led to the employees' withdrawal from the Union and the termination of the contract. Respondent proposed the idea of both the employee petition and the memorandum of agreement to terminate the contract, and also drafted and typed them. In addition, Respondent allowed employees to solicit and sign the petition during working time and provided supervisory assistance in making the petition available to potential signers.
>
> Clearly, Respondent did far more than merely allow employees to exercise the rights guaranteed them in Section 7 of the Act. Respondent actively and effectively participated in the process of furthering employee withdrawal from the Union.
>
> Accordingly, we adopt the Administrative Law Judge's finding that Respondent unlawfully aided in the circulation of the petition and encouraged employees to sign. [14]

[14] See *Shenango Steel Buildings, Inc.*, 231 NLRB 586, 588-589 (1977); *Dayton Blueprint Co., Inc*., 193 NLRB 1100, 1107-08 (1971).

Similarly, in *Placke Toyota*, 215 NLRB 395 (1974), the Board said:

> Although an employer does not violate the Act by referring an employee to the Board in response to a request for advice relative to removing a union as the bargaining rep-

resentative,[6] it is unlawful for him subsequently to involve himself in furthering employee efforts directed toward that very end. Thus, an employer's solicitation, support, or assistance in the initiation, signing, or filing of an employee decertification petition interferes with the employees' Section 7 rights.[7]

[6] *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1006 (1967).

[7] *Dayton Blueprint Co., Inc.*, 193 NLRB 1100, 1107-08 (1971); *Inter-Mountain Dairymen, Inc*., 157 NLRB 1590, 1609-13 (1966).

> Here Respondent did not initiate the decertification petition or "urge" employees to sign it, but it did lend more than minimal support and approval to the securing of signatures and the filing of the petition. Thus, if Respondent's activity had been limited to answering Whalen's inquiry about how to eliminate the Union by directing him to the Board, we would find no violation. However, Respondent put its imprimatur upon the petition at the very outset by permitting it to be circulated as a company document after being typed on Respondent's letterhead. And, Respondent continued to give the petition its open support—or at least the clear impression of open support—by allowing it to remain for several days on Supervisor Williams' desk. Finally, apparently after all employees had signed the petition, Williams asked Babb to file it with the Board and indicated he would ask Whalen to do so, thereby assisting in forwarding the completed petition to the Board. [Footnote omitted]
>
> In view of the foregoing, we find that Respondent's conduct in connection with the decertification petition interfered with and coerced the employees in the free exercise of their rights guaranteed in Section 7, thereby violating Section 8(a)(1) of the Act. [Footnote omitted] [Emphasis supplied].

Other cases in the same genre include *Hall Industries*, 293 NLRB 785, 791 (1989) (Since the Respondent actively stimulated the decertification effort and did so in the context of serious unfair labor practices, its conduct in this regard is also a violation of Section 8(a)(1) of the Act and the decertification petition which resulted from its effort is void ab initio.); *Architectural Woodwork Corp.*, 280 NLRB 930 (1986) ("Respondent violated Section 8(a)(1) by encouraging and soliciting employees to decertify the Union. In this regard we particularly note that the Respondent's 26 October entreaty to employees, in the wake of the Board's dismissal of the Respondent's RM petition, that it was up to them to file a decertification petition, followed closely on the heels of the Respondent's 22 October remarks that, inter alia, it was losing millions of dollars in contracts to outside shops who were nonunion, that it would not bargain with the Union, and its implication that some employees' wages would be reduced"); *Erickson's Sentry of Bend*, 273 NLRB 63, 64 (1984) ("Not only did Schmidt assist Richards, but he and Sears also gave the appearance that Erickson's favored the petition and encouraged employees to sign it and created a situation where employees would tend to feel peril in refraining from signing the petition. In addition, Sears made it clear by his statement to Jackson that Erickson's was monitoring who had or had not signed the petition. Accordingly, we find that Erickson's unlawfully encouraged and solicited employees to sign a petition to withdraw from the Union, thereby impairing employee freedom of choice in violation of Section 8(a)(1) of the Act") (footnotes omitted); and *Seneca Foods*, 244 NLRB 558 (1979) (Section 8(a)(1) violation where employer suggested the circulation of an antiunion petition; fostered, encouraged and/or participated in same).

Insofar as Respondent is concerned, there is no doubt that Warden Wagner initiated and stimulated the concept of filing a decertification petition and connected it to her polemic that the Union would deny the bargaining unit members the right to vote on bargaining and strike issues. So far as this record shows, absolutely none of her evidence concerning supposed employee unhappiness with the Union was true. Her claim concerning de la Fuente was false and her reference to other supposedly disaffected employees must be considered false as well. In fact, so far as this record is shows, those employees must be deemed nonexistent. It is clear that Respondent has offered no proof whatsoever that any employee ever asked Wagner how to get rid of the Union. The notices she posted, including directions to a decertification website, and the so-called 'need' for employees to act quickly given the Union's perceived unfair procedures (which she contrasted with 'proof' that the employees did not need a Union as evidenced by the Department of Labor's wage determination) all lead to the conclusion that she was engaging in nothing more than a corporate dance designed to oust the Union. That dance included a number of falsehoods about internal union procedures. This was not a response to any employee-generated concern. It was, instead, an underhanded, stealthy effort to get rid of the Union. Furthermore, she inferred she could monitor the employees and would know did and who did not support a decertification drive. Both the initiation of the concept and the how-to map she provided violate Section 8(a)(1).

In addition, that conduct, as an unfair labor practice, clearly qualifies as union animus and colors all of what followed, including the manner in which Respondent treated Carroll and the manner in which it handled the events leading to Mireles's discharge. It demonstrates that the Company and Wagner are entirely capable of using crafty and devious methods when dealing with union-related issues.

When Carroll returned to duty in January from his surgery there was no reason whatsoever to return him to the 'cards,'[22] except for a possible short-term schedule adjustment. Instead of simply returning him to his courtroom duties, it returned him to a less desirable situation than he had held before. The courtroom assignment was a stable Monday through Friday schedule. Working in the units involved a 6-day sliding, and therefore less regular, schedule. Standing alone, given the fact that Respondent has the right to assign correctional officers to all kinds of duties within that general occupation, a certain amount

[22] Respondent and its employees refer to the sliding schedules as 'cards' because they have to be posted to be understood. An example in evidence is GC Exh. 12.

of arbitrary assignments would not be remarkable. However, it does not stand alone. Wagner and Semler were well aware of the schedule differences and the concomitant lack of desirability of being on the cards. Furthermore, they were being driven by a certain amount of union animus. When one observes that Semler's explanation for not returning Carroll to the courtroom is unsupported, it raises the question of whether his decision was honestly based or whether it was influenced by Carroll's status as a union organizer and acting union vice president.

It is a commonplace in analyzing personnel decisions under the Act to observe that a demonstrably false or pretextuous reason for a negative personnel decision permits the trier-of-fact to conclude that the real reason is an unlawful reason. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Furthermore, if the negative treatment visited upon an employee includes union animus as a motivating factor, a prima facie case of discrimination has been established. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Thus it is so here. Semler claimed that he did not place Carroll back in the courtroom because he intended to train other employees to perform that duty, yet he never did train anyone else.[23] What, then, was Semler's actual purpose? On this record, it seems reasonable to conclude that it was somehow to let Carroll know that his union status did not prevent Respondent from treating him arbitrarily if it so chose—a kind of chastening. It was basically a demonstration of power, a lesson it believed Carroll would understand. Finally, when Semler determined that there really were no better candidates for the courtroom job, he relented and returned Carroll to the courts shortly before this hearing began. Respondent's treatment of Carroll, denying him the right to return to his job as a courtroom officer, was because he was a union official and because Respondent wanted to remind him that as a union official he was not free from Respondent's power to treat him arbitrarily. It violated Section 8(a)(1).[24]

Respondent's treatment of Mireles, while factually more complicated, falls into the same category. His circumstance is a little more broad. Not only was he a union official and activist, he also served as a Weingarten representative. That duty clearly falls within the category of an individual whose duty is to engage in the Section 7-authorized responsibility of 'mutual aid and protection.'[25] Rather clearly, any employee who serves as a Weingarten representative is serving in a capacity which by definition is for the mutual aid and protection of the individual undergoing the investigation.

As for the facts, there can be no debate that Castillo called for Mireles's presence knowing his function as a Weingarten representative. Furthermore, there can be no real debate about the fact that Mireles believed in good faith that a management representative was behind his being summoned for Weingarten purposes. When he received the call from Central Control Officer Vaught, Mireles had every right to believe that Vaught was acting pursuant to a routine which had been followed in earlier Weingarten happenstances. Objectively speaking, there was simply nothing irregular about the request for his presence.

Furthermore, Mireles's departure from his pod occurred upon Unit Control Officer Donahue's return to his post. I find it significant that Respondent did not call Donahue as a witness and I draw the adverse inference that if he had been called, he would have given testimony inconsistent with that argued by Respondent and consistent with the testimony given by Mireles. In any event, Mireles could not have left the B unit without Donahue's knowledge. Furthermore, Neri's testimony that Donahue told him Mireles had gone 'downstairs' is fully consistent with Mireles's version. Perhaps the better practice would have been for Mireles to have logged out, but he was simply following a practice which was routine and well-known to supervision. His answering the call and departing the unit for Administration in the manner he did never involved misbehavior of any kind. Indeed, after the fact, Respondent's principal corrective action for the remaining employees was to tighten the logging requirements, nothing more.

Later, after Mireles's fruitless effort to join the meeting in the warden's office, Wagner concluded, without any rationale that makes sense, that Mireles had claimed Semler had called for him and that his claim was a lie. We have already seen Warden Wagner's dissemblance with respect to fostering the decertification movement. Now we see an even less subtle form. Clearly Mireles had no reason to lie about why he was there or who had called him. He had acted in a routine way and expected that management already knew what he was doing. When she first faced the situation, Wagner's first instinct should have been to find out why Mireles was there. Indeed, she even had a compelling clue: Castillo had asked for a union representative. When she found the union/Weingarten representative outside the door, some sort of illumination should have occurred. Therefore, the natural question would have been 'why are you here?' Instead, she says she went through some sort of thought process which led her to assert that she perceived misconduct by Mireles. A misunderstanding had clearly occurred but Wagner, rather than clearing it up, decided to take advantage of it.

Still on her campaign to oust the Union, Wagner now had the acting union president in her sights. He had appeared, as she had just found out, without having been summoned by any manager. That was enough for her to start the ball rolling against him. She did that by directing Semler, rather than Investigator Pitula, to investigate the circumstances. To assure that the investigation resulted in discipline, she told Semler to find out why Mireles had lied about who had called him. Mireles, it will be recalled, testified he had repeatedly told them that he had been called by Central Control. That was the truth, but she knew if she told Semler to find out why Mireles had lied, Sem-

[23] Moreover, Respondent did not train anyone for courtroom work during Carroll's medical leave. His absence provided the perfect occasion to train another, but Respondent did not take the opportunity.

[24] I do not find an 8(a)(3) violation here as Respondent's treatment of Carroll does not implicate that Section 's 'hire and tenure' language.

[25] Sec. 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)." (Emphasis supplied for pertinency.)

ler would never question her declaration that Mireles had lied. Indeed, he could be led to adopt it and corroborate her.

After Mireles left the Administration area, Respondent got lucky. Mireles ran into Supervisor Small who directed him to work in unit J. This allowed Semler to exaggerate some of the circumstances in his report. Later even Wagner had to give Mireles credit for the time spent at unit J. Nevertheless, both continued to exaggerate the situation, for had Small not diverted Mireles, he would have returned to B unit after an absence of only about 40 minutes. Instead, they continue to characterize his absence as "over an hour." The documentation simply does not support that conclusion. Still, the incident caused Respondent to review the logs at unit B, finding out (though most already knew it) that correctional officers often left the unit for varying periods of time without logging out. Respondent does not see, or will not acknowledge, that its post rules on the point are sufficiently contradictory to have contributed to the employees' practice; first-line supervision seems to have operated under the same misapprehensions.

However, the personnel aspect of this matter was simply part of the overall effort to get rid of the Union. If during that endeavor Wagner could also find a means to discredit the Union's ability to assist employees in times of employment difficulties, such as erasing any hope of Weingarten representation, so much the better. The incident permitted Respondent to kill two birds with one stone: first, it demonstrated to the staff that Weingarten representatives were of no assistance, thereby undermining the need for the Union; second, it could discharge under a cloud of claimed prevarication, the individual who tried to carry out that duty, and thereby rid itself of the principal union leader.

The Respondent's luck continued. About a week later, Mireles, now feeling the heat of an unfair investigation and not wanting any of his fellows to suffer the same fate, used some sort of profanity to force them to listen to supervision as Harper/Small explained how the logging rules were being tightened. At the same time, Mireles informed the assembly that he was being investigated for that same issue. It was at that point that the room became quiet. Despite the fact that Mireles had supported the supervisors in the delivery of the new directives, Respondent later held that support against him.

Although Respondent does have a rule against profanity, it is a rule which is often ignored, even in the briefing room. The evidence shows that not only did correctional officers use bad language there, so did some of the supervisors. Furthermore, the penalties for profanity are arbitrary and inconsistent. They frequently do not fit the crime. Mireles's profanity was only aimed at getting employees to pay attention. It was not a firing offense. Both Williams and Harper knew it. Why did Semler inflate the situation as he did?

Given the way the matter developed, I am not convinced that Mireles's vulgarity during the briefing was really the issue. I observe that during his commentary he revealed that he was undergoing an investigation because he had not been following the logging rules as Respondent was now interpreting them. That news was of far more interest to the staff than any common vulgarity. Indeed, it can be seen as a union official's warning to other employees of a hazard they were all risking. Quite literally, it was an act of mutual aid and protection as defined by Section 7. *Cf. Whittaker Corp*., 289 NLRB 933 (1988). The fact Mireles's advice was accompanied by a mild profanity, or even a stronger one, aimed at getting his fellows' attention does not cancel its protected nature. Indeed, his leadership also had the added benefit of assisting the supervisors in delivering their message concerning the change in the logging procedures. This was a message both management and the Union wanted to impart. Two things are certain: Mireles was not insulting anyone and Mireles was exhibiting his leadership in a positive, if somewhat indelicate, in manner. As we have already seen, Respondent does not countenance employee leaders very well. In my view, once Semler learned that Mireles was continuing to flex his leadership muscles, that was another mark against him. The profanity and the supposed refusal to fill out a 5–1C are simply makeweight in the circumstances. Indeed, the entire briefing room incident was nothing more than Semler's attempt to bolster what he knew was Wagner's predetermined decision to fire Mireles. It was really nothing more than Semler adding an after-the-fact patch to justify Wagner's decision, a decision she had already revealed in a veiled way on February 13. After that it was just a matter of allowing Semler to build a paper trail.

That Semler was building such a trail is manifest. His investigation of the post abandonment/lying particulars is fraught with exaggerations, omissions, time-line misanalyses, one clear distortion (about the phone call) and padded with at least one employee's induced postscript (Vaught) and possibly another's (Donahue). Moreover, the manner in which he collected the 5–1C forms appears designed not to find the facts. Its shortcomings have already been discussed. The way in which the forms were used here was nothing more than a way of playing 'Gotcha.' He also unnecessarily enlarged the report with the statements of supervisors who were not even involved and who Semler knew he could exclude from the moment he spoke to Mireles and Vaught. Mireles never claimed a supervisor had authorized him to leave unit B and Vaught told him from the outset that he had called Mireles because Castillo had asked him to. What purpose did all the supervisor statements serve? All they did was expand the file. In my view Semler did this in order to be able to characterize the investigation as objective and thorough when it was nothing of the sort. Its outcome had been preordained as soon as Wagner told him Mireles had lied about who had told him to come to the office.

The foul language investigation a week later, compounded with the claim that Mireles had refused a direct order to fill out a 5–1C, is more of the same. Realizing that his investigation report was not as strong as he would like, Semler seized on a discourse that was slightly out of the ordinary, one which had already been addressed appropriately by Harper. Again, Semler, pleasing Wagner in accomplishing her aim, added some insurance to the decision. To the extent that one needs to resolve the differences between Mireles and Small/Williams regarding refusing to fill out the 5–1C relating to the briefing, the probabilities favor Mireles. Having a supervisor approach him at work, asking him to drop what he was doing and fill out the form, seems to describe a memorable incident. Williams's testimony about a phone call and Small's denial don't carry the

same imprint of memory. If necessary, I would find in Mireles's favor; but it is not. The decision to discharge him for discriminatory reasons had been made long before the briefing room matter. Even there, one can see that the charge of insubordination was added to the weaker claim of violating the bad language rule. All in all, Semler's approach to creating the paperwork to justify firing Mireles is a transparent misconstruction of events, all designed to justify a discriminatory decision.

As noted above, both the post abandonment and the briefing room incidents were merged for the purpose of discharging Mireles on February 24. In both instances Mireles was exercising rights guaranteed him by Section 7 of the Act. Each of those activities involved relatively straightforward instances of his acting for the mutual aid and protection of other employees. Standing by itself each of these incidents was protected. In the first, he was the union official serving as a Weingarten representative and in the second he was the acting union president warning the assembled employees he represented of a risk they had all been running. For serving in those two capacities Respondent discharged him. Such a discharge independently violates Section 8(a)(1) and also constitutes a violation of Section 8(a)(3) and (1).

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. More specifically, because Respondent discriminatorily assigned Edward Carroll to less desirable terms of employment due to his status as a union official, Respondent will be ordered to cease such discriminatory conduct. In addition, as Respondent discharged Cruz Mireles both because of his service as a Weingarten representative and because he engaged in other protected concerted activity, both integral parts of his duties as a union official, Respondent will be ordered to offer him immediate reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, it shall be required to expunge from Mireles's personnel file any reference to his illegal discharge, including the investigation report and the problem solving notice used to justify it. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, Respondent shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Beginning on October 8, 2003, Respondent acting through Warden Barbara Wagner embarked upon a campaign to encourage, foster, and instigate an employee movement to decertify or otherwise oust the union as the employees' collective-bargaining representative and in doing so violated Section 8(a)(1) of the Act.

4. Respondent violated Section 8(a)(1) of the Act in January 2004 when it discriminated against its employee Edward Carroll because of his status as a union official by assigning him to less desirable employment.

5. On February 24, 2004, Respondent violated both Section 8(a)(1) and Section 8(a)(3) of the Act when it discharged its employee Cruz Mireles because of his union activities and because of his protected concerted activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[26]

ORDER

Respondent, Corrections Corporation of America, San Ysidro, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Unlawfully initiating, encouraging, soliciting, or coercing employees in order to impel them to take steps to end their representation by International Union, Security, Police and Fire Professionals of North America (SPFPA), whether by decertification or by other means.

(b) Changing the work assignments of employees because of their status as a union official or because they have engaged in activity protected by the Act.

(c) Discharging or otherwise disciplining employees because they engage in activity protected by Section 7 of the Act, including serving as a union official or serving as an employee representative assisting fellow employees who are being investigated for misconduct.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Cruz Mireles full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Cruz Mireles whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy Section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Mireles's unlawful discharge together with the connected documentation, and within 3 days thereafter

[26] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d). Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e). Within 14 days after service by the Region, post at its prison in San Ysidro, California, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: February 3, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT initiate, encourage, solicit, or coerce you to get you to take steps to end your representation by International Union, Security, Police and Fire Professionals of North America (SPFPA), whether by decertification or other means.

WE WILL NOT change your work assignments because of your activities on behalf of International Union, Security, Police and Fire Professionals of North America (SPFPA), because of your status as an official of that union or because you engage in other activity protected by federal labor law.

WE WILL NOT discharge or otherwise discipline you because you engage in activity protected by federal law, including serving as a union official. If we investigate you for employee misconduct, you have the right to the assistance of a union representative during our investigation and WE WILL NOT discharge or discipline your union representative because he or she seeks to represent you during the course of that investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Cruz Mireles full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Cruz Mireles whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Cruz Mireles and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CORRECTIONS CORPORATION OF AMERICA

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."